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Chairman: Mr. Yáñez-Barnuevo (Spain)
later: Mr. Hmoud (Vice-Chairman) (Jordan)

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The meeting was called to order at 10.10 a.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (A/60/10)

1. **The Chairman**, recalling the contribution made by the International Law Commission to the progressive development of international law and its codification in accordance with Article 13 of the Charter of the United Nations, said that he hoped the debates would be substantive and stimulating, as in previous years.

2. **Mr. Momtaz** (Chairman of the International Law Commission) said that the Commission was aware of the importance of international law in the contemporary world and in the age of globalization, and saw an important role for itself in clarifying not only the traditional areas of international law but also its more contemporary and emerging practices and norms. It dealt with several complicated issues at the same time, which required understanding of the developments of the current year but also those of previous years. The Commission relied on the Sixth Committee for advice from Governments and information on State practice, when that information was not readily available. That was particularly the case for newer topics involving emerging practices that were not always accessible. The Commission's success in the codification of international law therefore depended to a large extent on the support it received from the Committee. Turning to Commission's report (A/60/10), he said he would concentrate on chapters VI, VIII and XII.

3. With regard to chapter VI, the Special Rapporteur for the topic "Responsibility of international organizations", had dealt, in his third report, with the existence of a breach of an international obligation on the part of an international organization and the responsibility of an international organization in connection with the act of a State or another international organization, for which he proposed draft articles 8 to 16, contained in chapters III and IV of the draft articles. Together with their commentaries, the draft articles appeared in chapter VI of the report.

4. Draft articles 8 to 11 addressed various aspects of the conduct of an international organization that constituted a breach of one of its international obligations. That was the second condition for an internationally wrongful act of an international organization to arise, as established in draft article 3, paragraph 2 (b). The four draft articles reflected articles 12 to 15 of the articles on the Responsibility of States for Internationally Wrongful Acts. Although available practice with respect to international organizations was limited, the articles on responsibility of States provided general principles that could be applied to the breach of an international obligation by any subject of international law.

5. Draft article 8, paragraph 1, indicated that an international organization breached an international obligation when its conduct, whether action or omission, did not conform to that obligation regardless of its origin as customary law, treaty law or a general principle or its character in terms of various classifications of international obligations. Those obligations might relate to the conduct of the organization or its member States or international organizations, or a combination thereof. The provision covered obligations incumbent on any subject of international law.

6. Although it might seem superfluous, paragraph 2 removed any doubt that the previous paragraph applied to breaches of international obligations established by a rule of the international organization in view of the practical importance of such obligations. Varying views on the legal nature of the rules of an international organization were set out in the commentary. The rules of an international organization designed to address breaches of its obligations, including the question of the existence of a breach, would not necessarily prevail over principles set out in the current draft, a point which might, however, be addressed in a final provision of the draft.

7. Draft article 9, concerning the requirement that the relevant international obligation must be in force for the international organization when the act occurred; draft article 10, concerning the extension in time of the breach of an international obligation; and draft article 11, concerning the breach of a composite act, closely reflected the corresponding articles on responsibility of States, with necessary minor drafting changes. There seemed to be no issues affecting the application of those principles to international organizations.

8. Draft articles 12 to 16 addressed various aspects of the responsibility of an international organization in

connection with the act of a State or another international organization. Those provisions reflected the corresponding articles on responsibility of States. Although available practice relating to international organizations was limited, the inclusion of such provisions was seen to be justified because parallel situations were likely to arise in respect of international organizations, and because there was no reason to distinguish between the responsibility of States and that of international organizations in such situations.

9. Those articles also dealt with the consequences of the unique relationship that might exist between an international organization and its member States, under which the organization was empowered to take decisions binding on its members. That relationship had no equivalent in relations between States and therefore was not covered in the articles on responsibility of States. As noted in the commentary, it was considered preferable not to assume, at the current stage of judicial developments, that a special rule existed to the effect that State authorities acted as organs of the European Community when implementing a binding act thereof.

10. Draft article 12 dealt with the international responsibility of an international organization for aiding or assisting in the commission of an internationally wrongful act by a State or an international organization. That provision corresponded to article 15 on responsibility of States, with minor drafting changes.

11. Draft article 13 dealt with the international responsibility of an international organization for directing and exercising control over the commission of an internationally wrongful act by a State or another international organization. That provision reflected article 17 on responsibility of States, with the relevant drafting changes. As the commentary specified, situations might arise in which two international organizations directed and exercised control over the commission of a wrongful act. Situations might also arise in which an international organization adopted a binding decision that constituted a form of direction and control over the commission of such an act by a State or another international organization. While the commentary noted that there might be an overlap between that provision and draft article 15, it pointed out the consistency of the provisions and the fact that draft article 15 also covered an additional case.

12. Draft article 14 dealt with the international responsibility of an international organization for coercing a State or another international organization to commit an internationally wrongful act. That provision corresponded to article 18 on responsibility of States, with the relevant drafting changes. There might be some overlap between draft articles 14 and 15 in those exceptional circumstances in which an international organization took a binding decision which constituted coercion. In such a case, responsibility could arise under either article without any inconsistency between the provisions.

13. Draft article 15 dealt with the international responsibility of an international organization for decisions, recommendations or authorizations addressed to member States and international organizations under two sets of circumstances. Paragraph 1 discussed situations in which an international organization adopted a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent one of its international obligations. That provision arose from the fact that an international organization, as a subject of international law distinct from its members, might try to circumvent its own international obligations indirectly by influencing the conduct of its members. That provision did not require the specific intention of the international organization to circumvent its obligations or the actual commission of the act by a member State or international organization. Accordingly, the third party would be able to seek a remedy even before the act was committed, on the basis of the probability that members would comply with such a binding decision and that the third party would be injured. Advancing the threshold of responsibility also avoided placing members in the difficult position of having to choose between infringing their obligations under the binding decision or causing the international responsibility of the international organization, and perhaps their own. That paragraph assumed that a compliance with the binding decision necessarily entailed the circumvention of an obligation of the organization. Decisions giving a member State or international organization sufficient discretion to pursue an alternative course of action were discussed in paragraph 2.

14. Paragraph 2 addressed situations in which an international organization authorized or recommended

a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization and would circumvent one of its international obligations. The paragraph covered all non-binding acts of an international organization which might influence the conduct of member States or international organizations. In addition, for the international responsibility of the international organization to arise, the authorized or recommended act must be committed, and the act must be committed in reliance on the authorization or recommendation of the international organization. The commentary noted that that provision was intended solely to cover reasonable reliance on the authorization or recommendation. In addition, the international organization would not be responsible for any other breach committed by the member State or international organization to which the authorization or recommendation was addressed.

15. Paragraph 3 indicated that, unlike the situations envisaged in draft articles 12 to 14, the international responsibility of an international organization under draft article 15 was not based on the unlawfulness of the conduct of the member State or international organization to which the decision, authorization or recommendation was addressed. If the conduct was unlawful, draft articles 13 and 14 would perhaps provide alternative bases for holding international organizations responsible, if the other necessary conditions were met.

16. Draft article 16 indicated that chapter IV was without prejudice to the international responsibility of the State or international organization which committed the act or of any other State or international organization. That provision reflected article 19 on responsibility of States.

17. The Special Rapporteur intended to address, in his fourth report, scheduled to appear in 2006, questions related to circumstances precluding wrongfulness and to responsibility of States for the internationally wrongful acts of international organizations. It would therefore be helpful for the Special Rapporteur and for the Commission to have the views of Governments as to whether the draft articles on responsibility of international organizations should include provisions similar to those contained in articles 16 to 18 on responsibility of States, which would concern cases in which a State aided or assisted an international organization in the commission of an internationally wrongful act, directed or exercised control over the commission of such an act, or coerced the commission of an act that would, without such coercion, constitute an internationally wrongful act. It would also be useful to know whether there were other cases in which a State could be held responsible for the internationally wrongful act of an international organization of which it was a member.

18. Chapter VIII of the report dealt with the topic "Expulsion of aliens", which was the second of the two new topics taken up by the Commission in the current year. The Commission had considered the preliminary report of the Special Rapporteur (A/CN.4/554), which had outlined his understanding of the subject and had included a proposed general work plan and a partial bibliography.

19. The Commission had generally agreed with the Special Rapporteur's framing of the basic issue underlying the topic, namely how to reconcile a State's right to expel with the requirements of international law, particularly those relating to the protection of human rights. The Commission had taken the view that the "right" of the State to expel aliens was generally recognized under international law, albeit subject to certain limits, mostly in the context of human rights law, to the violation of which international law attached legal consequences. However, some members had expressed doubts as to the proposed approach of giving a priori status to States' right to expel, while relativizing human rights standards. Paragraphs 247, 261 and 262 of the report contained further discussion of the issue.

20. A key question had concerned the concept of expulsion of aliens to be applied. Different views had been expressed on the scope of the topic, with some members preferring a broader scope while others had suggested some limitations. For example, it had been proposed that issues of refoulement, internally displaced persons, non-admission of asylum-seekers or refusal of admission for regular aliens, movements of population or situations of decolonization or self-determination, and the position of the occupied territories in the Middle East, should not be considered. Support had also been expressed for not covering measures of expulsion taken by a State vis-à-vis its own nationals of an ethnic, racial or religious origin different from that of the majority of the population. While there was a preference in the Commission not to address questions of persons expelled during an armed

conflict, it was maintained that existing rules on armed conflict could not be entirely disregarded because international humanitarian law included precise rules on expulsion of aliens. Paragraphs 253 to 256, 272 and 274 of the report contained a discussion of those and other issues.

21. With regard to terminological questions, while support had been expressed for the Special Rapporteur's preference to retain the term "expulsion", some members had expressed concern that his tentative definition, namely that expulsion constituted "a legal act in which a State compels an individual or group of individuals who are nationals of another State to leave its territory", was too broad. There had been support in the Commission for including in the concept of "aliens" persons residing in the territory of a State of which they did not have the nationality, with a distinction being made between persons in a regular situation and those in an irregular situation. The topic would also include refugees, asylum-seekers, stateless persons and migrant workers. The relevant discussion was contained in paragraphs 254, 257 to 260 and 273 of the Commission's report.

22. The Commission had next considered the question of the grounds for expulsion. It had been recognized that the right of a State to expel was necessary as a means of protecting the rights of the population which existed within the territory of the State. At the same time, while it had been recognized that the State enjoyed wide discretion in exercising its rights to expel aliens, such discretion was not absolute. For example, opposition had been expressed to the existence of a "right" of collective expulsion. Hence, while an expulsion might involve a group of people sharing similar characteristics, the decision to expel should nonetheless be taken at the level of the individual and not that of the group. The relevant discussion was contained in paragraph 267 of the report.

23. Furthermore, the right of the State to expel had to be balanced against existing fundamental human rights protections, as well as other limitations recognized under customary international law. Reference had been made to a number of substantive and procedural safeguards recognized by international law. Examples given of such rights relating to expulsion had included the requirement that expulsion should not be undertaken arbitrarily but pursuant to a decision reached in accordance with the law and that the expulsion should not be carried out in an unreasonable, inhumane, degrading or humiliating manner, or with violence or unnecessary harm to the alien. Other suggestions had included giving particular attention to procedural guarantees, including those remedies capable of preventing expulsion; specifying that such fundamental guarantees applied to the entire expulsion process and not only to the procedure for the examination of individual cases; requiring the expelling State to notify the alien concerned of the decision to expel; and granting the alien the right to appeal such decision, where appropriate. The discussion on those issues was contained in paragraphs 263 to 268 of the report.

24. With regard to the methodological questions mentioned in paragraphs 269 and 270 of the report, the Commission had generally supported the Special Rapporteur's proposal that the focus should be on drafting articles covering all aspects of expulsion, i.e. a complete regime including existing conventional rules. It had been felt that a mere body of general principles would not be particularly useful or effective. It had been understood that the proposed study of the topic would be undertaken on the basis of a thorough consideration of existing customary international law and treaty law, including a comparative study of international case law at both the global and the regional levels and of national laws and practice. At the request of the Special Rapporteur, the Commission had entrusted the secretariat with the task of preparing a compilation of applicable national and international instruments, texts and jurisprudence on the topic. Delegations were referred to paragraph 27 of the report, which stated that the Commission would appreciate receiving any information concerning the practice of States on the subject, including national legislation.

25. Turning to chapter XII of the report ("Other decisions"), he said that, since the Commission intended to complete the second reading on two topics the following year, it had decided to include an additional new topic, "The obligation to extradite or prosecute (*aut dedere aut judicare*)", in its work plan. That topic had been included in the long-term programme of work the previous year. The Commission had appointed Mr. Zdzislaw Galicki Special Rapporteur for the topic.

26. As in the past, the Commission had been cooperating with other bodies, including the Inter-

American Juridical Committee, the Asian-African Legal Consultative Organization and the European Committee on Legal Cooperation, and had had a visit from Judge Jiuyong Shi, President of the International Court of Justice. Members of the Commission had also conducted informal exchanges of views with other bodies and professional associations on some of the topics currently under consideration by the Commission. Those bodies and associations were listed in paragraphs 503 to 509 of the report.

27. The Commission, having considered paragraph 8 of General Assembly resolution 59/41 on cost-saving measures, as well as budgetary constraints and the requirements of the programme of work of the Commission for the current session resulting from unforeseeable circumstances, had reduced the duration of the second part of its fifty-seventh session by one week.

28. The Commission attached great importance to the International Law Seminar, which was held annually in Geneva during the meetings of the Commission and enabled young lawyers, particularly those from developing countries, to familiarize themselves with the Commission's work and the activities of international organizations with headquarters in Geneva. Through its Chairman, it therefore expressed its appreciation to those Governments that had contributed to the Seminar and urged States to provide financial assistance as soon as possible.

29. He alluded to the importance of the Commission's secretariat, the Codification Division of the Office of Legal Affairs. Its competence, efficiency and valuable assistance, in respect of both the substance of the Commission's work and the procedural aspects thereof, were vital to the success of that work. Since the Division also served as the secretariat of the Sixth Committee, it was an invaluable and irreplaceable link between the two bodies and provided a high-quality service which must be preserved. The Commission particularly appreciated the memorandum prepared by the Division entitled "The effect of armed conflict on treaties: an examination of practice and doctrine" (A/CN.4/550 and Corr.1).

30. **Ms. O'Brien** (Ireland), referring to the draft articles on the responsibility of international organizations, said that, given the increasing number and significance of international organizations, both as members of the international community and as subjects of international law, the Commission's attention to the matter of their responsibility was both welcome and timely. Given the paucity of practice upon which to draw in formulating the draft articles, the Commission's previous work on the articles on responsibility of States for internationally wrongful acts provided a good basis for elaborating a corresponding regime for international organizations.

31. The relationship between draft articles 3, 4 and 15 needed to be developed further. While draft article 15 provided for an international organization to be held responsible for the acts of its member States in certain circumstances, draft article 3, which contained the general rule, was silent on the matter. The Commission's commentary of 2003 had stated that "the statement of general principles in article 3 is without prejudice to the existence of cases in which an organization's international responsibility may be established for conduct of a State or of another organization". However, it would be preferable for draft article 3 to provide explicitly for the responsibility of international organizations for the acts of their member States in certain cases.

32. In that connection, regard should also be had to draft article 4, which provided for international organizations to be held responsible for the acts of their agents or organs. The term "agent" potentially covered any legal person, including a member State of an international organization. However, it was unclear whether the references to agents in draft article 4 were intended to include such member States, and draft article 3 was silent on the issue. Article 4 should be reviewed to determine whether the acts of member States should be included or excluded; it might be useful to provide that, in certain circumstances, States were to be regarded as agents of organizations of which they were members.

33. Her delegation particularly welcomed draft article 15, which provided that the responsibility of an international organization was engaged if a member State acted pursuant to a binding decision taken by the international organization. However, the draft article did not cover the situation where the act of the member State would not have incurred international responsibility if committed by the international organization. International organizations might possess legislative powers that were derived from a transfer of competence from their member States. Therefore, it

might fall to those member States to fulfil the international obligations of international organizations.

34. A recent case before the European Court of Human Rights, *Bosphorus Hava Yollari Turizm ve Ticaret AS v. Ireland*, had raised the question of whether and, if so, in what circumstances, a member State of a regional international organization — in the case in question, the European Community — should be held responsible for conduct which it was obliged to carry out by the law of that international organization. The case had arisen in the context of trade sanctions against the former Federal Republic of Yugoslavia during the 1990s. A Security Council resolution requiring United Nations Member States to impound any aircraft found in their territory originating from that country had been implemented in European Community law. In the case in question, Ireland had actually been bound by its obligations under the Charter of the United Nations. However, the Court's judgement had focused on the obligations of High Contracting Parties to the European Convention on Human Rights that were also member States of the European Community. The European Court of Human Rights had no jurisdiction to pronounce on acts of the European Community as the Community was not a party to the Convention. Accordingly, although Ireland had been acting at the behest of the Community, because the Community itself was not bound in international law by the Convention, the Commission's draft article 15 would not have applied.

35. The applicant in the case had alleged that Ireland's compliance with European Community law had constituted a breach of Ireland's obligations under the Convention. However, since Ireland had been legally bound to implement the relevant European Community regulation, the alleged violation had not involved the exercise of any discretion by Ireland. It was not clear whether draft article 4 applied so as to render Ireland an agent of the Community for the purpose of attributing responsibility for the impounding of the aircraft.

36. In the case in question, the European Court of Human Rights had found that, because the European Community, as the relevant international organization, afforded protection of fundamental human rights equivalent to that afforded by the Convention, it was unnecessary for it to review the regulation for compliance with the Convention. Hence, Ireland had not breached its obligations under the Convention. However, the case had highlighted the need for clarification of the position under international law in such matters. Draft article 15 would not have applied to that case: the acts carried out by the member State of the international organization would not have incurred the international responsibility of the organization as that organization was not a party to the European Convention on Human Rights. Article 15 would entail international responsibility only for a breach of an international obligation of the international organization. That left a lacuna where a member State breached an international obligation that was not an obligation of an international organization as a result of its membership of that international organization.

37. As noted in the Commission's report, an international organization should not be allowed to escape responsibility by "outsourcing" its actors. Similarly, States should not be able to escape their responsibilities by seeking refuge behind the protective screen of an international organization. If the draft articles were intended to embrace the possibility of responsibility without attribution of conduct, it would be desirable to achieve that aim in a manner that was explicit and internally coherent. The article should be expanded to include acts which, although entailing international responsibility on the member State, would not have entailed such responsibility if carried out by the international organization.

38. Turning to draft article 8, and in particular the reference to the rules of the international organization in paragraph 2, she said that the status of such rules was of a highly uncertain nature in international law. The International Law Association had devised a substantial set of "recommended rules and practices" covering the internal obligations of international organizations but, in a similar vein to draft article 8, had avoided pronouncing on the legal status of such rules. There did not currently appear to be sufficient agreement in international law to support the view that all breaches of the internal rules of an international organization were also internationally wrongful acts. For that reason, her delegation welcomed the existing wording of draft article 8, paragraph 2.

39. **Mr. Bennouna** (Morocco) said that, at a time of reform in the United Nations, the Commission's standard-setting role was crucial. In that context, he commended the Commission's decision to include in its programme of work the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)",

which bore on the implementation of a number of conventions on the suppression of international crime and terrorism.

40. Turning to the work on current topics, his delegation commended the approach adopted by the Special Rapporteur on shared natural resources — to present States with a flexible normative framework, which they could then adapt through bilateral or regional agreements — in view of the variety of issues involved in managing transboundary aquifers and aquifer systems. The same approach had proved useful when the Commission had finalized the Convention on the Law of Non-Navigational Uses of International Watercourses. In both cases, international cooperation was essential to the management of shared resources. The draft articles proposed by the Special Rapporteur would provide a framework for such cooperation, making use of legal techniques that had proved their worth in the Convention. His delegation welcomed the fact that the draft articles contained a provision specifically aimed at developing countries. It was important that any new element of international law relating to relations between States should take into account different levels of development.

41. With regard to the effects of armed conflicts on treaties, his delegation considered it appropriate to include treaties concluded by international organizations as well as those concluded by States, even though the former were not, as a rule, parties to conflicts and the United Nations did not have territory of its own. The draft articles should apply to any armed conflict, international or domestic, regardless of whether war had been declared. There remained, however, the question of the point at which a minor armed incident became a conflict. In any case, as soon as an armed conflict broke out, followed by a breakdown of order and security, there were inevitable effects on the implementation of domestic law and international agreements, although the termination or suspension of a treaty would also depend on the parties' explicit or implicit intention at the time the treaty was concluded. In any case, any treaty whose object and purpose necessarily implied that it was applicable in a situation of armed conflict remained so once the conflict had started.

42. The Commission had yet to reach a definite decision on the list of treaties. Drawing up such a list was fraught with difficulties, however, and it might be more worthwhile to emphasize the nature of the treaty and its applicability or otherwise in situations of armed conflicts rather than engage in the delicate process of categorizing treaties. Following the simple suspension of a treaty, it would seem logical, once the conditions that had given rise to such suspension no longer existed, to revert to full implementation of the treaty concerned. In practice, however, the parties might have different views, which would need to be settled by agreement. His delegation welcomed the fact that the Special Rapporteur intended to review the content of draft article 10 and reconsider the legality of the conduct of the parties to a conflict. A State acting in exercise of the right to self-defence or in accordance with a Security Council decision should be able to terminate treaties incompatible with that right or that decision. The Special Rapporteur was correct in saying that the invalidity of a treaty in respect of the rules of the Charter of the United Nations on the use of force did not come within the scope of the topic under consideration by the Commission.

43. With regard to the responsibility of international organizations, it was, again, logical that the Commission was modelling the draft articles closely on the structure of the draft articles on responsibility of States for internationally wrongful acts. Further study of the relationship between the obligations and the responsibility of international organizations was required, however. It was not appropriate to include in the topic the involvement of States in illegal acts committed by such organizations. On the other hand, any involvement by international organizations in the commission of illegal acts by States should certainly be included.

44. Concerning diplomatic protection, he noted that the Special Rapporteur had rightly, in his consideration of the draft articles on second reading, addressed the question, of the "clean hands" theory, which was sometimes viewed in terms of the capability of exercising diplomatic protection. The Special Rapporteur had, however, decided that the theory related, strictly speaking, to inter-State disputes and not to diplomatic protection, which applied in situations in which a State took up the cause of its national who had suffered harm at the hands of another State. Where the national's conduct was illegal, diplomatic protection did not apply. The Special Rapporteur had adopted a classic approach, pursuing the concept of "clean hands" to its logical conclusion so as to maintain the consistency of the draft articles.

At the same time, he had suggested — and the vast majority of the Commission had agreed — that the concept should not be covered by the draft articles.

45. The topic "Expulsion of aliens" was clearly of paramount importance at a time when the Global Commission on International Migration had just reported and the General Assembly had decided to hold a high-level meeting on migration in 2006. The question of the expulsion of aliens, which was linked with that of diplomatic protection, presented the difficulty of reconciling the right to expel with a State's obligation to protect fundamental human rights. The Commission would clearly need to distinguish between foreign nationals who were legally present in a country and immigrants who had entered illegally or whose presence had become illegal. The legal distinction should be carried through into the legal consequences of expulsion. It would also be important to put some limits to the topic, so as not to include questions which related to international humanitarian law. In a State governed by the rule of law, it was clear that a foreign national whose presence in the country was lawful could be expelled only after his case had been considered by a judge, who would take into account the relevant legislation. Where expulsion occurred, it must respect the dignity and fundamental rights of the person concerned. His delegation welcomed the forthcoming study by the Special Rapporteur and the secretariat of national laws on the topic and rulings by supreme courts with a view to identifying major trends and the main directions for the codification and progressive development of the topic.

46. The Commission had not yet managed to determine the limits and scope of the topic "Unilateral acts of States", particularly the question whether unilateral acts should be codified as sources of international law or as components of more classic sources, such as customary law, treaties or general principles. It was not enough to say, as the Working Group had done, that unilateral acts could have legal effects; agreement should be reached on the legal category to which such acts belonged. Much effort had gone into the consideration of the topic, but, to date, little real progress had been made.

47. When the topic of "Reservations to treaties" had first been taken up, in 1993, the Commission had assumed that all that was needed was to fill in a few gaps in the Vienna Convention on the Law of Treaties. The Special Rapporteur had, however, gone into the topic in great detail and enriched it, most recently in his treatment of the questions of the validity of reservations, the definition of the object and purpose of a treaty and reservations to a provision articulating a customary rule. The Commission had accepted his draft guidelines, which clarified some of the key provisions of the Vienna Convention. Those guidelines were already being applied.

48. The Committee should consider whether the Commission should be requested to examine various important topics that had arisen in connection with United Nations reform, such as the responsibility to protect.

49. *Mr. Hmoud (Jordan), Vice-Chairman, took the Chair.*

50. **Mr. Liu** Zhenmin (China) said that the Commission had played a highly significant role in codifying and developing international law over the past 60 years. Of the 26 topics of which it had completed its consideration, 17 had been adopted in the form of conventions, which had played and would continue to play an important role in promoting friendly relations among States. Whether or not it resulted in a convention, the Commission's work invariably served as an important point of reference in the study and practice of international law.

51. With regard to the topic "Responsibility of international organizations", his delegation's view on whether there was a breach of an international obligation by an international organization when its conduct consisted of an omission was that, as a subject of international law, an international organization was different from a State, in the sense that it was controlled by its member States and most cases its authority was optional rather than mandatory. Whether an omission on its part therefore constituted an internationally wrongful act would fundamentally depend on whether it was explicitly obliged under international law to take action. With regard to the question of an act that an international organization requested its member States to commit but which would be internationally wrongful if committed by the international organization itself, his delegation shared the Special Rapporteur's view that the latter should incur international responsibility for such an act. As decisions, recommendations and authorizations made by an international organization with a view to circumventing its international obligations produced

widespread international repercussions they should be rendered wrongful by law. The Special Rapporteur believed that an international organization's recommendations and authorizations were different from its decisions, because responsibility arose only when the former were implemented by member States. Further study should, however, be conducted to ascertain whether such a distinction was justified. Although recommendations and authorizations were not as binding as decisions on member States, the distinction seemed to make better sense when it came to determining the level of responsibility of member States.

52. His delegation believed that a State incurred international responsibility if it aided, or assisted, or directed and controlled an international organization into the commission of an internationally wrongful act or coerced it into committing such an act. Since the issue was not covered by the draft articles on State responsibility, a provision to that effect should be included in the draft articles on the responsibility of international organizations.

53. On the question whether member States incurred international responsibility for an internationally wrongful act committed by an international organization, his delegation believed that, since the decisions and actions of an international organization were, as a rule, under the control, or reliant on the support, of member States, those member States that voted in favour of the decision in question or implemented the relevant decision, recommendation or authorization should incur a corresponding international responsibility.

54. With regard to the expulsion of aliens, his delegation commended the Special Rapporteur's approach. As for the methodology to be used, the priority should be to conduct a comparative study, drawing on the domestic law of all States, the relevant rules of international law and the jurisprudence of international and regional judicial bodies with a view to producing a compendium of rules of international law pertaining to the expulsion of aliens. It was to be hoped that the Commission would pay equal attention to developed and developing countries, so that the results of its study would be representative of practice in a wide variety of countries. As to the scope of the study, refusal of entry was a highly complex issue, for which there was no one solution. When a person had yet to enter the territory of the expelling State, the need for expulsion simply did not arise. On the other hand, refusal of entry to an alien returning to his country of residence, in which he had established social and economic relations, or to an immigrant on board a vessel or plane under the control of the expelling State should be considered as coming under the category of expulsion. Account should also be taken of the treatment of persons who had applied for entry but had yet to enter the territory of the country in question. The large-scale expulsion of a population as the result of a territorial dispute should not be covered under the topic, because it involved sensitive political issues and did not lend itself to treatment from the legal point of view. Collective expulsion was prohibited under international law, since in most cases such action was discriminatory. In practice, however, the question whether expulsion of all persons aboard a vessel or in a vehicle constituted collective expulsion would depend on a combination of complex elements. Lastly, his delegation considered that the right to expel was inherent in the sovereignty of States and was indispensable for the maintenance of order. It was not only a right but a duty. At the same time, States should safeguard the basic human rights and dignity of the aliens expelled and ensure that they received humanitarian treatment.

55. **Mr. González-Campos** (Spain), focusing solely on those aspects of the Commission's work which had actually resulted in the codification and progressive development of international law, said that the large number of subjects examined by the Commission during its fifty-seventh session bore witness to the tremendous efforts its members had made. It also suggested that, although no major changes ought to be made to the programme of work, it might in future be advisable given the limited amount of time available to the Commission, to give priority to specific topics with a view to concluding the first reading of complete sets of draft articles on them, so that the Sixth Committee could comment fully on the whole text.

56. He was pleased that the Commission had decided to embark on a new topic, "The obligation to extradite or prosecute (*aut dedere aut judicare*)" since, it was not only a matter the Committee had long wished to study, but was also of great topical interest because of recent developments in international criminal justice and because of its implications for the universal criminal jurisdiction of States. The Commission's consideration of that question might decisively

strengthen the rule of law in the field of criminal justice.

57. It was also gratifying to note that the preliminary report of the Special Rapporteur for the topic "Expulsion of aliens" had highlighted both the scope of the concept of "expulsion" and the need to reconcile a State's customary right to expel with the limits international law placed on that right for the sake of protecting human rights. That was an important issue and reflection on it would help to determine the weight of some of the legal values States had generally come to share as the international system had taken shape.

58. The presentation of new draft articles on transboundary aquifers and aquifer systems, the responsibility of international organizations and the effects of armed conflicts on treaties would certainly lend impetus to the Commission's deliberations at its next session, when it should likewise achieve more progress on the question of diplomatic protection by producing a complete set of draft articles on that topic.

59. Further headway must also be made with unilateral acts of States, notwithstanding the complexity of the subject matter. The case law of the Permanent Court of International Justice and the International Court of Justice offered a rich source of examples of State practice. It would be advisable to restrict the scope of the topic to core issues, namely the obligation a State could assume through a unilateral declaration, the conditions governing its validity and its effects on third States, including the corresponding rights of those States. That would obviate the need to examine the complex reality of the "conduct" of States with regard to a specific situation. It might prove well nigh impossible to ascertain the legal effects of general conduct and establish appropriate rules because, in order to do so, the precise circumstances of each and every case would have to be determined and that was a matter for an international court or tribunal.

60. **Mr. Trauttmansdorff** (Austria) welcomed the third report of the Special Rapporteur for the topic "Responsibility of international organizations" and the draft articles and commentaries adopted by the Commission at its fifty-seventh session. He observed that article 8, paragraph 2, was obviously designed to make it clear that paragraph 1 also applied to the breach of an obligation under international law established by a rule of the organization. However, since paragraph 1 already covered any international obligation regardless of its origin and character, paragraph 2 was repetitious and should therefore be deleted.

61. Article 15, paragraph 2 (b) ought to be reconsidered, because it was of doubtful value in clarifying the relationship between the responsibility of a member State which had acted wrongfully on the authorization or recommendation of an organization and the responsibility of the latter organization, since the whole concept of a member State's reliance on the authorization or recommendation of an organization was rather vague. A very close connection between the authorization or recommendation and the relevant act of the member State would be required before an internationally wrongful act of a member State could give rise to the responsibility of the organization in question. Such a link could be created through the use of an expression such as "in compliance with" or "in conformity with". Any wrongful act that was not necessary for the implementation of the authorization or recommendation would not, by that token, be grounds for invoking the responsibility of the organization.

62. Another vital question was whether, and to what extent, an international organization should be held responsible for the recommendations and authorizations it issued. Since the articles on State responsibility were silent on the matter of incitement, it was reasonable to ask why international organizations should be held responsible for recommendations, which had the same effect as incitement. While it was not possible to rule out the possibility of such responsibility, the provision of more information in the commentary on the justification for and limits of such responsibility would be helpful, for otherwise problems could well arise if an organization recommended that a State perform an act contrary to the obligations incumbent upon the organization, but not upon the State. The wording of draft article 15, paragraph 2 (b), would entail the responsibility of the organization although no breach of a rule of international law had occurred, since a recommendation alone could not be deemed to constitute a breach.

63. Bearing in mind the content of articles 3 and 4, deeper thought ought to be given to the question whether the responsibility of an international organization for a wrongful act authorized or recommended by it would be exclusive or whether it would overlap with the responsibility of the State

committing the act. In the event of overlapping responsibility, it would be for the relevant court to decide what weighed heaviest: the actual act or the underlying authorization or recommendation.

64. As for the specific issues connected with the responsibility of international organizations on which the Commission would appreciate comments (A/60/10, para. 26), his Government took the view, with regard to question (a), that the Commission should deal with the legal consequences of aid, assistance, direction, control and coercion exercised by a State in respect of an international organization. Wherever appropriate, the draft should closely follow the principles laid down in the articles on State responsibility.

65. Turning to question (b), he noted that the case law of the European Court of Human Rights indicated that, under the European Convention on Human Rights, member States were responsible for the acts of international organizations, even after they had transferred competence to those organizations. Neither the International Court of Justice, in the *Legality of Use of Force* cases, nor the European Court of Human Rights, in the *Bankovic and others* case, had denied their jurisdiction on the grounds that member States of the North Atlantic Treaty Organization (NATO) were not responsible for the acts of the organization during the Kosovo conflict. Indeed, it could be argued that the responsibility of NATO member States might be incurred owing to their failure to secure rights protected by the European Convention on Human Rights within NATO bodies. Furthermore, the *International Tin Council* case and the *Westland Helicopters* case could be examined from the perspective of the international responsibility incurred by member States for their negligent supervision of organizations.

66. The expulsion of aliens was a highly complex topic and in considering it, it was necessary to bear in mind the broader framework of aliens' rights, which were mostly regulated by national legislation. Any codification work on the topic therefore called for a thorough analysis of that legislation. If the Commission wished to define justifications for expulsion, it would be advisable first to look at the corpus of national laws on the subject before endeavouring to draw any general conclusions.

67. **Mr. McRae** (Canada) said that the Commission was facing two challenges as far as the responsibility of international organizations was concerned. First, international organizations, as creatures of treaties, operated under international law. Internally the relations of the organization with its member States were governed by the rules of the organization, but externally the organization interacted with other organizations, non-member States and member States acting in a non-member State capacity. Were the rules governing the relations of organizations with their members "international obligations" in the same sense as the rules governing their relations with other organizations, non-member States or member States acting in a non-member capacity?

68. The legal nature of the rules of the organization and doubts regarding their place in international law deserved more in-depth consideration than they had been given in the commentary to draft article 8. If article 8, paragraph 1, stood alone, it would imply that whether any responsibility attached to obligations created under the rules of the organization would depend on whether those rules created international obligations. The wording of paragraph 2 seemed to signify, however, that, without paragraph 2, international obligations created by the rules of the organization would not be covered by the draft articles, an inference which would seem to conflict with the plain meaning of paragraph 1. The word "also" was confusing and should therefore be deleted.

69. Furthermore, paragraph 2 suggested that not all rules of an organization could create international obligations. If that were so, he wondered what the criteria were for determining whether an international obligation founded on the rules of the organization existed in any particular case and hence whether an act of that organization attracted international responsibility. By not providing guidance in that respect, the Commission had left much uncertainty on an important issue.

70. The second challenge derived from the fact that the diversity of international organizations made it hard to find a core common to their processes and practices in order that rules applicable to all of them might be formulated. It was equally difficult to decide when it was appropriate to frame rules that would take due account of the differences in international organizations and how to make such rules. The need for special provisions relating to international organizations which assigned responsibility for fulfilling certain treaty obligations to member States

was particularly obvious in the case of the European Community. The draft articles assimilated the European Community to other international organizations. That status had an impact on States in their dealings with the Community, particularly in the context of the World Trade Organization (WTO), where it was not always clear if it was the Community, or individual member States, which should be cited in dispute settlement procedures concerning measures taken by Community members, acting either as de facto Community organs or separately under their own competence. Since the Community claimed responsibility for implementing acts by member States, it had to assert that claim in each case before WTO panels. That was what it had done in the WTO decision mentioned in footnote 119 of the Commission's report. Rather than endorsing a particular view, the panel had simply accepted that the Community had explained its domestic constitutional arrangements in order to spare the panel from having to arrive at separate findings for each member State.

71. The Commission should give further thought to that question, since the nub of the issue was whether the responsibility of the Community could be established despite the fact that Community obligations were fulfilled through the action of member States. That might be one instance where the application of the same rules of responsibility to all international organizations did not pay sufficient heed to their diversity or to the practical requirements of any such rule.

72. The issue of the extent of the responsibility of States for the wrongful acts of international organizations had potentially far-reaching consequences and turned on the ambit of the terms "aids and assists" and "directs and controls". Could it be held that, just by being a member of an organization, a State aided and assisted the commission of an internationally wrongful act by the organization? Would responsibility attach only to those who voted in favour of such an act? Would voting in favour of such an act constitute direction and control? Or would something quite different have to be done to attract responsibility? Until the scope of any such potential State responsibility could be defined more clearly, his Government reserved its opinion on whether such matters should be included in the draft articles.

73. **Mrs. Belliard** (France) noted that the Commission had agreed to include in its very heavy programme of work various topics which, in her delegation's view, should receive special attention during its next session — the last of the current quinquennium. One of those topics was the draft articles relating to diplomatic protection, on which France would soon be submitting written comments. She sincerely hoped that the Commission would not allow timetable considerations to interfere with a thorough examination of the draft articles adopted on first reading the previous year. The current text provided useful clarifications, but it also included provisions which might give rise to controversy or confusion and which should therefore be discussed further. In her view, the reasons given by the Special Rapporteur as to why it was not necessary to deal with the consequences of diplomatic protection were not fully convincing. Even if diplomatic protection constituted an exception with regard to the general law on responsibility, the question whether a State was under an obligation to pay over to an injured individual money that it had received by way of compensation for a claim based on diplomatic protection was fundamental, and she believed that, at least in that regard, the examination of the topic of diplomatic protection remained incomplete.

74. With regard to unilateral acts of States, the deliberations of the Working Group on the subject offered some interesting ideas. However, the suggestion that the law of treaties could generally be transposed to unilateral acts should be considered carefully. It would be preferable to determine whether that was indeed the case with respect to the formulation, effects or revocation of such acts, for example. In addition, the examination of the topic should be limited to unilateral acts *stricto sensu*, saving the study of unilateral conduct for later. The Working Group's preliminary conclusions would undoubtedly provide a basis for substantial progress on the topic during the next quinquennium.

75. Her delegation wished to raise two concerns in relation to the Commission's report. The first had to do with the approach taken to the matter of effects of armed conflict on treaties. There was room to question some of the choices made by the Special Rapporteur, notably his emphasis on the effects that the intention of the parties could have. Certainly, that was one criterion to be borne in mind, but in no circumstances should its application lead to disregard for the cardinal principle of the prohibition of resort to the use of force. A State

which used force in violation of the Charter of the United Nations obviously could not be in the same situation as that of the State which was the victim of its actions. The second concern, which her delegation had expressed several times before, related to the sensitive issue of fragmentation of international law. She noted that the Study Group on the topic intended to propose a condensed set of conclusions, guidelines or principles for adoption by the Commission in 2006. The Commission should, however, proceed with utmost restraint, as the adoption of such a document, when both its status and content remained undetermined, could cause more doubt and confusion than it helped to alleviate.

76. On the question of the responsibility of international organizations, her delegation supported the approach to the topic taken by the Special Rapporteur, namely, following the general pattern of the articles on responsibility of States for internationally wrongful acts adopted in 2001. Before turning to the specific questions posed by the Commission, she wished to comment on some of the draft articles adopted during the fifty-seventh session. Draft article 8 was a perfect example of a sound adaptation of the 2001 articles. Paragraph 1 in effect reproduced article 12 of the text on responsibility of States, while paragraph 2 made it clear that the breach of an obligation set by a rule of an international organization was also considered a breach of an international obligation by the organization. That clarification was useful. Her delegation took the view that the rules established by an international organization constituted a priori rules of international law, and those who infringed them incurred responsibility. In that regard, she had been a little concerned to note in the commentary to draft article 8 that the Commission had preferred not to express a clear-cut view on the question of the legal nature of the rules of the organization, first because it was difficult to deal with the breach of an international obligation without defining clearly what the term meant and, second, because the difficulties indicated by the Commission seemed rather theoretical. In practice, the principle of *lex specialis* should suffice in most cases to deal with the question of responsibility for breach of the rules of the organization. Draft article 8, paragraph 2, was therefore in the nature of an explication and, as such, was not a source of major difficulty.

77. Chapter IV of the draft articles, concerning the responsibility of an international organization in connection with the act of a State or another international organization, was an important chapter inasmuch as it envisaged an inherent responsibility of international organizations. As subjects of international law, international organizations could incur responsibility and were not therefore "transparent" in the sense that it would be appropriate to examine first the responsibility of other subjects, in particular that of member States, for the acts of the organization.

78. From that standpoint, draft articles 13 and 14 were not problematic. The commentary to those articles raised the interesting question whether a binding decision by an international organization could be regarded as a form of direction, control or coercion. If such were the case, the organization could incur responsibility either directly, by taking the decision, or indirectly, by means of the direction, control or coercion implied by the decision. It should be more clearly established that the concepts of direction, control and coercion, as used in draft articles 13 and 14, did not refer to the question of the legal effects of the decisions taken by an international organization. That was particularly important in the case of article 14 in order to avoid any needless confusion over the difference between the necessary respect for binding decisions of an international organization and the idea of coercion.

79. With regard to draft article 15, while recognizing the importance of the principle put forth therein, her delegation had some questions as to the conditions under which an international organization could incur international responsibility. The Commission made a clear distinction between draft article 15, paragraph 1, relating to binding decisions taken by the organization, and paragraph 2, concerning cases in which an international organization might authorize or recommend that a member State commit an internationally wrongful act. In the first case, the Commission did not make actual commission of the act a condition for the incurrence of responsibility by the organization. That omission could create the impression that responsibility could be incurred by reason of a wrongful act that might not, in fact, have been committed. The distinction did not, therefore, seem desirable and the reasons for which it would be necessary were not evident.

80. With regard to the specific issues on which the Commission had requested comments from States, while it was true that the question of responsibility of States for the internationally wrongful acts of international organizations had not been dealt with directly in the articles on responsibility of States for internationally wrongful acts, it would nevertheless be useless to draft detailed rules on the matter, as there seemed to be little difference between the situation of international organizations and that of States in that regard. A saving clause accompanied by a commentary should be sufficient.

81. **Mr. Panahiazar** (Islamic Republic of Iran), referring to chapters II, III and XII of the report (A/60/10), welcomed the Commission's decision to include in its programme of work the important topic "The obligation to extradite or prosecute" and looked forward to seeing the first report of the Special Rapporteur for that topic. He was, however, concerned that the budgetary constraints and cost-saving measures mentioned in paragraph 497 of the report would adversely affect the function and productivity of the Commission, particularly with such a heavy workload. Appropriate time and resources should be allotted to allow for a thorough discussion and exchange of views on the nine substantial, delicate and controversial topics currently in the programme. In that connection, his delegation shared the concerns expressed by the Commission in paragraph 498 with regard to timely submission of reports by Special Rapporteurs and in paragraph 501 on the question of honoraria for Special Rapporteurs.

82. With regard to chapter III of the report, he expressed appreciation for the Commission's identification of issues and articulation of questions to be addressed by Governments, which undoubtedly had contributed to a more structured and focused debate within the Sixth Committee. His delegation encouraged the Commission to continue that useful practice. It agreed that written comments by Governments on drafts prepared and questions raised by the Commission were very useful. Ideally, a majority of States would provide such written replies to specific questions by the Commission or questionnaires prepared by Special Rapporteurs. Experience indicated, however, that a considerable number of States, for various reasons, were not in a position to do so. Accordingly, to reach truly common ground, the Commission should pay due attention to the statements of delegations in the Sixth Committee and to other forms of communication by States.

83. His delegation wished to underline the usefulness of the International Law Seminar held every year in conjunction with the annual session of the Commission in Geneva. The Seminar provided a truly unique opportunity for young lawyers and Government officials pursuing an academic or diplomatic career to advance their civil service to both their respective countries and to the international community, and made an invaluable contribution to the study and dissemination of international law. It was to be hoped that the Seminar would continue in the future, taking into account the special needs and priority of the developing countries.

84. With regard to the expulsion of aliens, while it was, as the Special Rapporteur had observed, an old question closely linked to the organization of human societies in the form of States, it remained of current interest and raised important questions of international law. Making the decision to expel aliens was a sovereign right of the State. However, the State should exercise that right in accordance with established rules and principles of international law, particularly fundamental principles of human rights. In other words, a distinction should be made between the right and the way in which it might be exercised. Any expulsion should be based on legitimate grounds, as defined in domestic law, taking into account issues such as public order and security or other essential national interests. Nevertheless, the grounds should not be contrary to international law. The Islamic Republic of Iran agreed fully with the Special Rapporteur that collective expulsion was contrary to human rights and prohibited by international law, and that it therefore should not be practised.

85. His delegation appreciated the efforts of the Special Rapporteur to formulate a clear-cut definition of the concepts of "expulsion" and "aliens". It should be noted, in that regard, that most of the seemingly similar or interwoven concepts and terms, such as "refugees", "asylum-seekers" and "migrant workers", had their own international legal regime. The issue of expulsion from occupied territories by the occupying Power fell within the realm of international humanitarian law and thus was clearly outside the scope of the topic of expulsion of aliens. The decision by a Government to expel an alien, as a unilateral act of that State, should not be regarded as imposing any

obligation or commitment whatsoever on any other State, including the State of nationality, to receive the alien. That did not mean, however, that the matter could not be settled or managed by mutual agreement. His delegation supported the idea that a thorough examination was needed of the status of aliens who had been residing in the territory of the expelling State for a long time and/or had lost all or most of their interests in their State of origin or had acquired special interests in the expelling State. The status of transit States was also highly significant. It was his understanding that in such cases a transit State had no obligation to readmit expelled aliens or to undertake similar commitments.

86. **Mr. Park** Hee-kwon (Republic of Korea), responding to the two questions posed by the Commission concerning the draft articles on the responsibility of international organizations, said that the answer to both questions was "yes". Article 57 of the articles on responsibility of States for internationally wrongful acts, adopted in 2001, stipulated that the articles were without prejudice to any question of the responsibility under international law of an international organization, or of any State for the conduct of an international organization. The commentary to that article then explained that article 57 was a saving clause which reserved two related issues from the scope of the article. Those issues pertained to any question concerning the responsibility of any State for the conduct of an international organization. Article 57 also excluded from the scope of the articles issues of the responsibility of a State for the acts of an international organization, i.e., those cases in which the international organization was the actor and the State was said to be responsible by virtue of its involvement in the conduct of the organization or by virtue of its membership of the organization. Even though cases of aid, assistance, direction, control and coercion were not explicitly mentioned in the commentary, those acts entailed the responsibility of States by virtue of the involvement of the latter in the conduct of the organization. Consequently, an additional provision on such acts of the State would be necessary.

87. As to the Commission's second question — i.e. whether a State could be held responsible for the internationally wrongful act of an international organization of which it was a member — it remained controversial. The domestic judicial decisions rendered in the *Westland Helicopters* case and in the *International Tin Council* cases did not reveal a unified attitude under international law on the question of member States' responsibility towards injured third parties for the wrongdoing of an international organization. Those decisions focused on the responsibility of member States for contractual obligations of the international organizations, which fell not under international law, but under the corresponding domestic law. Moreover, the legal nature of member States' responsibility was not clear. Should a member State's responsibility be residual and arise only in the event of default by the wrongdoing international organization, or should it arise concurrently with the responsibility of the organization? Those questions seemed to remain in the realm of *lex ferenda*. However, a unified legal solution should be developed because, otherwise, injured third parties were likely to go "forum shopping", seeking the domestic law that would provide the most favourable legal environment for the claimant. That, in turn, would lead inevitably to inconsistent national judgements. To fill that legal lacuna, his delegation would propose two types of measures: (1) *ex poste ante* measures, such as informing potential injured third parties of the scope of responsibility of member States regarding specific acts of concerned international organizations, and (2) *ex post facto* measures, such as establishing an international fund to address unforeseen situations.

88. With regard to the expulsion of aliens, while he understood why the Special Rapporteur had said that the history of mankind had been characterized by mistrust of strangers and the temptation to withdraw from contact with them, he took a more optimistic view. Mistrust had resulted primarily from the natural human fear of the unfamiliar, and it was his firm belief that such ignorance and fear could be overcome by contact and communication with people different from oneself. He agreed entirely with the Special Rapporteur, however, when he said that in the current era of globalization barriers hindering the movement of persons seemed somewhat outdated and even contradictory. That was, he believed, an inherent limitation deeply rooted in the prevailing nation-State system, which was based on the principle of territorial sovereignty. While the time might come when such barriers would vanish and humankind would live in a genuine world community, for the time being it remained important to discuss how such barriers were working. He therefore submitted his views on the

subject and on the work of the Commission, bearing in mind the twin principles of territorial sovereignty and the ideal of a world community.

89. Before entering into a detailed discussion of the topic, it was important to clarify the concept of expulsion and to distinguish it from non-admission. The traditional view was that expulsion concerned aliens whose entry or residence had initially been permitted, while non-admission concerned those whose entry into the State had been prevented, but that categorization left in legal limbo the status of those who had entered a territory without authorization. In such instances, the action of a State that removed an alien might be classified as non-admission. However, that perspective would not only unduly limit the scope of the Commission's work; it would also leave unaddressed the interests and concerns of many illegal residents around the world. As an alternative, he would suggest that the term "expulsion" should apply to aliens who were physically in the territory of the State, whether lawfully or not. That was the case with the Immigration Control Act of the Republic of Korea: the provisions on the expulsion of aliens applied to all aliens, regardless of the legality of their initial entry into the country. Non-admission, on the other hand, should concern those whose entry had been denied and who therefore had, in fact, not entered the territory at all. In accordance with that understanding, non-admission could be excluded from consideration, although it might still be necessary to differentiate clearly between non-admission and expulsion in order to complete the work.

90. The next issue was coming to an understanding regarding the term "alien". He preferred the use of that term to "foreign nationals" because the former was wider, including stateless persons as well as citizens of foreign States. While refugees and migrant workers were also covered under the term "aliens", their status with regard to expulsion, if any, should not be dealt with in the study of the topic. If any sub-categorization was needed with regard to the concept of aliens, it related to permanent residents, to whom international law seemed to extend a degree of special treatment. Clarification was needed as to whether long-term residents could claim any additional rights beyond those of non-residents in cases of expulsion. Under the laws of the Republic of Korea, permanent residents were treated more favourably than non-residents. Grounds for their expulsion were stricter and were limited to cases in which a permanent resident had committed a serious crime. For historical reasons, millions of Korean citizens were currently resident in foreign countries. His delegation therefore had a particular interest in the issue and hoped that it would receive the attention it deserved.

91. In conclusion, he wished to remind the Committee that there was a case on the docket of the International Court of Justice directly related to the issue of expulsion of aliens. The case of Ahmadou Sadio Diallo, between Guinea and the Democratic Republic of the Congo, concerned the expulsion of a long-term resident in the latter State. It was to be hoped that the Court's decision in that matter would help to clarify some of the issues related to the topic.

The meeting rose at 1.10 p.m.

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Chairman: Mr. Yáñez-Barnuevo ..... (Spain)

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Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*)

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05-56880 (E)

The meeting was called to order at 10.10 a.m.

Agenda item 80: Report of the International Law Commission on the work of its fifty-seventh session (*continued*) (A/60/10)

1. **Mr. Braguglia** (Italy), welcoming the preliminary report of the Special Rapporteur on the expulsion of aliens (A/CN.4/554), said that the Special Rapporteur seemed to favour the elaboration of rules focusing on individual expulsions that would supplement those set out in article 13 of the International Covenant on Civil and Political Rights. A text produced by the Commission could serve as the basis for an additional protocol to the Covenant. If that were the intention, it would be useful for the Commission to collaborate with bodies that had specific competence in the field of human rights protection, such as the Human Rights Committee, which had valuable experience with regard to the application of the Covenant.

2. Referring to the Commission's invitation to States to supply information concerning their practice in relation to the expulsion of aliens, he said that it would be useful to have more details about what approach the Commission intended to take and what specific issues it intended to address. Rules on the expulsion of aliens were often complex and linked to constitutional, administrative and procedural rules that needed clarification so as to provide an accurate idea of how practice was developing.

3. With regard to the draft articles on responsibility of international organizations, his delegation supported the current formulation of draft article 15, on decisions, recommendations and authorizations addressed to member States and international organizations (A/60/10, para. 206). In its future work, the Commission should make it clear that, in general, States had no responsibility for the conduct of an organization of which they were members because international organizations possessed distinct international legal personality. However, certain exceptional cases might arise in which the responsibility of such member States would be incurred.

4. It was not strictly necessary for the Commission to formulate draft articles that provided expressly for the responsibility of States that aided, assisted, directed or coerced an international organization, on the basis of articles 16, 17 and 18 of the articles on responsibility of States for internationally wrongful acts. However, such an express provision would make the draft articles more transparent.

5. **Mr. Tajima** (Japan) said that the diverse legal status, structure, activities and membership of international organizations made it difficult to lay down universally applicable guiding principles on responsibility. The general thrust of the Special Rapporteur's well-considered third report (A/CN.4/553) was, however, correct. It would be prudent to follow the basic structure of the articles on State responsibility, but to modify them when they were not apposite and to be mindful of the fact that those articles could serve only as a starting point when considering the responsibility of international organizations.

6. An international organization was not only itself a subject of international law; its members were subjects as well, which meant that, theoretically, an internationally wrongful act committed by a member State of an international organization might give rise to responsibility on the part of both the organization and the State. The draft articles and the commentary were rather ambiguous about the sole difference between the responsibility of an international organization and that of a State. Hence further analysis was required.

7. Similarly, draft article 15, as provisionally adopted by the Commission at its fifty-seventh session (A/60/10, para. 206), should be clarified in order to say whether the member State, or States, that had committed an internationally wrongful act at the behest of an international organization also shared responsibility. Allocation of responsibility ought to be analysed in the light of the content, nature and circumstances of the act committed by the member State and of the rules of the organization concerned. Moreover, the draft did not make it clear if States bore the same responsibility under draft article 15, paragraph 1, as under paragraph 2. In the situation referred to in paragraph 1, member States were obliged by the international organization to take illegal action, whereas in that referred to in paragraph 2 they were not. The commentary contained no mention of that distinction or its possible consequences. Further exegesis of those points by the Special Rapporteur would be welcome.

8. Discussion of the topic of the expulsion of aliens was particularly important in a world where the transboundary movement of people had intensified in the wake of globalization. The Special Rapporteur's preliminary report (A/CN.4/554) had provided a summary of the issue, but further study of the scope, definition of concepts and scrutiny of the legitimate grounds for expulsion were plainly needed. The applicable rules did not stem from customary law alone, but were closely linked to human rights regimes and other fields of international law. The topic's relationship with those regimes must therefore be taken into account.

9. Since the expulsion of aliens was a matter of concern to many countries, the Commission must be encouraged to complete its work on it in a timely manner. For that reason, it was to be hoped that further progress would be made at the Commission's fifty-eighth session.

10. **Sir Michael Wood** (United Kingdom), speaking on behalf of the European Union; the acceding countries Bulgaria and Romania; the candidate countries Croatia and Turkey; the stabilization and association process countries Bosnia and Herzegovina, Serbia and Montenegro and the former Yugoslav Republic of Macedonia; and, in addition, the Republic of Moldova and Ukraine, welcomed the progress made by the International Law Commission on the draft articles on responsibility of international organizations. The European Union and the aforementioned countries also aligned themselves with the following statement.

11. **Mr. Kuijper** (Observer for the European Commission), speaking on behalf of the European Community, said that the European Community was a specific international organization and therefore had a specific perspective on the work of the International Law Commission relating to the responsibility of international organizations. Draft article 8, paragraph 2, referred to "an obligation under international law established by a rule of the international organization" but did not give any guidance as to what sort of rules qualified as "obligations under international law". In the case of the European Community, the crucial question was whether a violation of secondary Community law by an institution of the Community triggered the international responsibility of the European Community. Given that the Court of Justice of the European Communities characterized the Community as having a legal order of its own, the prevailing view in the Community would be that such a violation did not trigger the Community's international responsibility.

12. The same would be true of a breach of secondary Community law by a member State. The commentary might be of some help in that it stated that the draft article did not intend to take a position between those who regarded the "internal" law of international organizations as partly or wholly autonomous in relation to international law and those who regarded it as an integral part of international law. Nonetheless, the European Community wondered whether draft article 8, paragraph 2, was an essential part of the draft articles.

13. With regard to draft article 15, the European Community agreed that there were no clear practical examples to assist in the formulation of the provision. He therefore encouraged the Commission to approach further discussions on the issue with great care. He welcomed the distinction in draft article 15 between binding decisions of an international organization (draft paragraph 1) and mere authorizations or recommendations (draft paragraph 2), which meant that an international organization would not be liable for acts of its member States if the latter were not required by the organization to take a certain action but decided to do so of their own volition. However, the distinction might require further refinement. In the European Community, secondary Community law could be binding in its entirety and directly applicable in all member States (regulations), or binding only as to the result to be achieved, leaving to the national authorities the choice of form and methods (directives), or binding only upon those to whom it was addressed (decisions). An obligation of result (as in a Community directive) came close to a binding decision, but might nonetheless leave a certain amount of discretion to the individual member State.

14. With regard to draft article 15, paragraph 1, the European Community wondered whether the notion of circumvention was superfluous, given that compliance by members with a binding decision was to be expected, as stated in the Commission's own commentary on the draft article. If so, it might be desirable to replace the word "circumvent" with the word "breach". On the other hand, if the idea that the mere adoption of a law constituted a breach of international law was restricted to the domain of World Trade Organization law and had not taken hold in

general international law, or depended in any case on what the law actually stated, then the notion of circumvention did have a function. It would be useful for the Commission to clarify the draft article and the comments pertaining to it.

15. **Mr. Lammers** (Netherlands), referring to the draft articles on responsibility of international organizations, said that there was an inconsistency between draft articles 2 and 15. According to draft article 2, "international organizations may include as members, in addition to States, other entities". The word "entities" included, but was not limited to, international organizations. Draft article 15 was narrower in that it referred to "member States and international organizations". He therefore suggested that draft article 15 should refer simply to a "member" or to a "member of the organization".

16. Draft article 15, paragraphs 1 and 2, established international responsibility of an international organization for acts committed by its members that would be internationally wrongful if committed by the organization. That criterion for the incurring of responsibility was appropriate and clear. However, the act concerned would also have to circumvent an international obligation of the organization concerned. That criterion had not been included in the draft article as proposed by the Special Rapporteur; it had been only briefly mentioned in his third report (A/CN.4/553) for the purpose of explaining the rationale of the draft article. Moreover, the meaning and scope of the criterion were not clear; he wondered how it would be demonstrated that a given act circumvented an international obligation of the organization.

17. Paragraphs 1 and 2 of draft article 15 drew a useful and necessary distinction between binding decisions, which gave a member little room for manoeuvre, and authorizations or recommendations. However, it might be preferable to use the more general term "non-binding decision" instead of "authorization or recommendation", as suggested in the commentary on draft article 15. Moreover, while the Commission distinguished between authorizations and recommendations, no distinction was drawn as to the implications for responsibility of the organization. Authorizations and recommendations were subject to the same criteria as binding decisions and to one additional criterion: the member committing the act in question must do so "in reliance on that authorization or recommendation". That additional criterion was not mentioned with regard to binding decisions in paragraph 1 of the draft article because members were bound to comply with those decisions.

18. Under draft article 15, paragraph 2, an international organization could not be held responsible for the mere adoption of an authorization or recommendation. It would incur responsibility only if the member actually committed the act in question and did so in reliance on those non-binding decisions. However, it was difficult to see how that provision would operate in practice. For example, the General Assembly, in its resolution 2105 (XX), had recognized the legitimacy of the struggle by the peoples under colonial rule to exercise their right to self-determination and independence and had invited all States to provide material and moral assistance to the national liberation movements in colonial Territories. He wondered whether, if a State Member of the United Nations provided such assistance to a particular people, the colonizing State could claim that the United Nations carried responsibility, distinct from the possible responsibility of the Member State concerned. Moreover, he would like to know how it would be determined that the act had been committed by the Member State "in reliance on" the resolution. He therefore requested the Special Rapporteur to provide examples of situations in which that paragraph had found application or, at least, could or should have been applied.

19. With regard to the question of the expulsion of aliens, his delegation agreed that a State's right to expel aliens was inherent in the sovereignty of that State but could not be considered absolute. It was regulated by various instruments of international law or by rules of customary international law, which provided a balance between legal and humanitarian issues. It might not be necessary for the Commission to elaborate draft articles on the expulsion of aliens, although the possibility need not be ruled out. He agreed with the approach envisaged by the Commission, which was to consider what rules already existed on the topic, to develop them further where possible or appropriate and to codify them, taking into account the factual problems arising from the expulsion of aliens. The outcome, in whatever form, should fill in the gaps in existing rules and regulations and should not be at odds with existing international instruments. It should also address problems that States had or might have in practice, such as those relating to

the expulsion of stateless persons. On the other hand, the approach taken should not be too broad and should exclude elements that were of purely theoretical interest.

20. The Netherlands was not engaged in the collective expulsion of aliens and agreed with the view that, while an expulsion might involve a group of people sharing similar characteristics, the decision to expel should be taken at the level of the individual and not of the group. A basic rule of that kind could be included in the possible draft rules.

21. His delegation was pleased that the question of the expulsion of aliens was on the Commission's agenda and viewed the Special Rapporteur's preliminary report on the subject (A/CN.4/554) as the first step in an important discussion.

22. **Mr. Buchwald** (United States of America) said that the issue of expulsion of aliens was complex and challenging. States had to find a delicate balance between their national immigration laws and policies, their international legal obligations, national security concerns and respect for the rule of law. His delegation welcomed the acknowledgement in the Special Rapporteur's preliminary report (A/CN.4/554) that careful attention must be paid to the long-recognized sovereign right of States to expel aliens. Efforts to identify the limitations on that right under international law should focus on those derived from obligations freely assumed by States, particularly under international human rights treaties. The Commission should not address the refusal to deny entry to aliens at the border; it should observe the distinction between aliens who were lawfully present and those who were not; and it should not consider issues already addressed by other specialized bodies, such as the transfer of aliens for law enforcement purposes or issues relating to diplomatic personnel.

23. The issue of the responsibility of international organizations was similarly complex. Unlike States, which shared fundamental qualities, international organizations varied greatly in their functions and structures, which made it difficult to develop uniform rules. For example, the relationship between a government official and his country was significantly different from that between an individual and the international organization that employed him. The draft articles should not, therefore, simply parallel the rules set forth in respect of States in the articles on responsibility of States for internationally wrongful acts. It was to be hoped that the Commission would place particular emphasis on relevant practice.

24. Under the articles on State responsibility, a State incurred vicarious responsibility only if it aided or directed another State in committing an act that would be internationally wrongful if committed by the first State itself. That condition might operate quite differently, however, when applied to the vicarious liability of international organizations. For example, under articles 12 and 13 of the draft articles on international responsibility of international organizations, an international organization might be authorized to provide assistance for States to take certain kinds of action but not to take such action itself. In that case, the taking of the action by the international organization could be said to be internationally wrongful. Yet it was not evident that the provision of assistance for such action should be a trigger for international responsibility. It was true that, for responsibility to arise under articles 12 and 13, the State in question would need to be acting in breach of an international obligation. It was not clear, however, that that would provide a sufficient safeguard where the responsibility of the international organization was concerned. There might be a variety of reasons why it was unlawful for a particular State to act in a certain way. A State might have conflicting obligations. It was an area that merited further reflection.

25. Draft articles 12 and 13 turned on whether an international organization had taken action "with knowledge of the circumstances of the internationally wrongful act". Yet again the provision was drawn from the draft articles on responsibility of States for internationally wrongful acts. Such a requirement applied very differently for an international organization from the way it did for a State. For example, it was not clear what kind of knowledge was involved. An international organization did not take direction from its secretariat or professional staff in the way that a State did from its leaders and other employees. Indeed, it was States that constituted and directed the action of an international organization; and States might have very different assessments of the legality of a contemplated course of action.

26. Draft article 15 was intended to cover cases beyond those already covered by draft articles 12 and 13. It gave rise, however, to a similar difficulty, namely, what it meant for an international organization

to be circumventing one of its obligations. It would therefore be helpful for the Commission to make clearer the intended meaning of "circumvention". Draft article 15 went further, however, in that it did not require, as a condition for an international organization to incur liability, that the State to which the recommendation, authorization or decision was directed should be prohibited from undertaking the action in question. It appeared to follow that an international organization could be liable for directing, authorizing or recommending that a State should take action that was in fact lawful for that State to undertake. The practice or policy considerations on which such a principle would be based was unclear.

27. Moreover, it was hard to see how authorizations or recommendations could trigger liability. They could be implemented in a variety of ways and, so long as there was no question of assisting or controlling — an issue that was covered by other draft articles — it seemed illogical to hold an international organization responsible if a State unlawfully implemented recommendations or authorizations that it could have implemented lawfully or could have freely decided not to implement.

28. His delegation was considering whether it would be beneficial for the draft articles to account more explicitly for the fact that binding decisions, authorizations or recommendations by an international organization could substantively affect the underlying legal obligations of States to which they were addressed in a way that decisions, authorizations or recommendations by States rarely could. One example was decisions under Chapter VII of the Charter of the United Nations; but the same considerations might apply to other international organizations, whose decisions could affect the legal rights and obligations of member States to each other. The fact that an international organization took a particular action, for example, might result in a situation in which a State was no longer prohibited from taking a previously prohibited action. One implication of that was that the responsibility of an international organization towards its members differed in practice from its responsibility towards non-members.

29. **Mr. Tavares** (Portugal) expressed the hope that the Commission would be able shortly to complete the second reading of the draft articles on diplomatic protection and on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities). It was important that some topics should be completed during the current quinquennium, given that, no work had been finalized for State action since 2001. In that context, he welcomed the growing interaction between the Commission and the Committee. Special rapporteurs increasingly referred in their reports to the views of Governments as expressed in the Sixth Committee. Conversely, the Commission's work had become more acceptable to States.

30. The interaction could be enhanced still further if summary records were replaced by a verbatim record of government statements submitted by delegations to the Secretariat in electronic form. The efficient allocation in time to each topic and proper progression through the scheduled agenda would also be beneficial. His delegation was concerned, however, about the Commission's increasingly frequent practice of requesting comments from States before a special rapporteur had written his report. Such an approach was unacceptable, since it distracted Governments' attention from the general progress of work on draft articles. States should comment on progress made, not on forthcoming work in the abstract.

31. Not an easy topic in the first place, "Responsibility of international organizations" was becoming increasingly complex. First, it was progressing at a different speed from the topic of responsibility of States for internationally wrongful acts, which would not help with the formation of a coherent body of law. Secondly, the draft articles were too closely modelled on the articles on State responsibility. The effect was of growing incoherence. International organizations were subjects of international law that differed in several respects from States, being very diverse in their structure and nature. Where the Special Rapporteur had tried to be innovative, on the other hand, new problems arose. However, innovations appeared only in draft article 8, paragraph 2, and draft article 15.

32. The draft articles adopted by the Commission at its fifty-seventh session demonstrated the inadequacy of following too closely the articles on State responsibility. Article 11, paragraph 1, for example, seemed too complex to apply to international organizations, owing to the fact that — by contrast with the situation of States — issues of attribution arose. Not only was it difficult to determine what

should be considered an aggregate act, but different parts of a composite act might be performed by different organs of the organization, in such a way that some might be performed by the organization and another by member States. Bodies like the Security Council, the Council of the European Union and the United Nations Secretariat were both intergovernmental and international.

33. Draft articles 12, 13 and 14 seemed to overlook the nature of international organizations and their relationship with member States, third States and other international organizations. Whereas assistance, control or coercion could exist in relations between sovereign States, the issue was more complex when it came to international organizations. Various questions arose: how it could be legally determined that a given international organization was aiding or assisting another State or international organization for the purposes of article 12; whether the State referred to in draft article 13 was a member State or a third State; and how one international organization could direct or control another. The same applied with even greater force to draft article 14, which dealt with coercion. His delegation preferred the Special Rapporteur's approach in draft article 15, which seemed to cover the situations dealt with in the preceding three articles. That being so, draft articles 12 to 15 were redundant. He could envisage no situation that might be subject to the provisions of draft articles 12, 13 and 14 that was not also covered by draft article 15. Draft articles 12, 13 and 14 should therefore be deleted and draft article 15 redrafted.

34. As for the innovative provisions, his delegation considered the provision in draft article 8, paragraph 2, unsatisfactory, for several reasons. First, a rule of an international organization was of necessity an international rule and not merely a rule of that organization. Draft paragraph 2 was therefore redundant. Secondly, it opened up the possibility of endless discussion of whether and when a rule of an organization was international or internal. Thirdly, the definition of "rules of the organization" contained in draft article 4, paragraph 4, was unsatisfactory. The so-called "established practice" of an organization could not give rise autonomously to an international obligation whose breach would constitute an internationally wrongful act.

35. In draft article 16, as set forth in the Special Rapporteur's report (A/CN.4/553), and then provisionally adopted as draft article 15, the Special Rapporteur had recognized the need for a provision addressing the specific nature of international organizations, which functioned internationally through decisions, recommendations and authorizations. The draft article should, however, be redrafted, so as to incorporate the provisions of draft articles 12 to 14. Moreover, although States and international organizations were required to determine the conformity of their conduct with international law, prior to taking action, there was a significant difference between acts by States in accordance with binding decisions of an organization and acts by States with a large measure of discretion. Moreover, due regard had not been paid to the fact that, while the provision applied to member States and other international organizations, the position of third States was unclear. Member States were ipso facto bound by a decision of an international organization, but that did not apply to other international organizations or third States.

36. Some other questions were being overlooked. For example, there was no institutional forum at which substantive rules on the responsibility of international organizations could be addressed. That, should not in itself, prevent the codification and progressive development of such rules, but the fact should be borne in mind. Another concern was that the Commission was seemingly formulating general abstract rules on the basis of the special case of one international organization, the European Community. References to the Community practice were, of course, acceptable, given its richness, but the European Union was an organization of such a specific nature that it could hardly be called a model for other international, intergovernmental organizations. It might therefore be wise to exclude regional integration organizations from the scope of application of the draft articles.

37. Overall, the draft articles should be simpler, and more leeway should be given to those interpreting and applying the law. Perhaps a better approach would be to make a general reference to the applicability, mutatis mutandis, of the principles of State responsibility, followed by draft articles or guidelines dealing with the specific problems raised by the question of responsibility of international organizations, as already proposed by the International Law Association and the Institut de Droit International.

38. With regard to the expulsion of aliens, there was a question mark over the true scope of the topic.

Important though it was, there was no evidence that it deserved autonomous treatment or that it had a sufficient theoretical and practical background. His delegation could detect only issues that were already being dealt with by national legislation or the international human rights system. It was therefore questionable whether the topic was suitable for codification and progressive development. His delegation doubted, for example, whether the expulsion of a foreigner could be qualified as a unilateral act of a State, in the sense of being grounded in international law. The expulsion might be unilateral, but the source was the national legislation.

39. His delegation agreed that, despite sovereignty rules, the right of a State with regard to the admission, permanence and expulsion of aliens was not absolute. On the contrary, the State was bound by a range of obligations deriving directly from international human rights law. That constituted no novelty, however. And there were no other discernible limits to a State's actions than those already provided for by customary and treaty law. He challenged the Commission to convince the Committee that the topic deserved autonomous treatment. If it met that challenge, explanations would also need to be found to some other questions: whether a single study should deal with both individual and collective expulsions; whether it was appropriate to refer to diplomatic protection, which seemed out of place in that context, in that it arose only where there was a breach of international law and after the exhaustion of local remedies; and whether it was right to include in the topic the issues of State responsibility with regard to wrongful expulsions, which was already dealt with under the relevant rules of responsibility of States for internationally wrongful acts.

40. **Mr. Taksoe-Jensen** (Denmark), speaking on behalf of the five Nordic countries (Denmark, Finland, Iceland, Norway, and Sweden), said that those countries believed it was important to recognize the significant role the Commission had played as a strong promoter of an international legal order. The task of building an international legal order was perhaps more important now than ever before. The Commission's work, in their view, should be even more efficient and focused, and greater effort should be made to prioritize its work on individual topics. Certain topics had been on the agenda for years, such as the matter of international liability, of great interest to the Nordic countries.

41. The broad agenda of the Commission was perhaps responsible for the protraction of the latter's work. As the Nordic countries had previously pointed out, once a topic had been included, it was impossible to strike it out. It would be useful, at an earlier stage, to identify what the realistic outcome of the Commission's work on a topic would be, a task which would of course be the joint responsibility of the Commission and of Member States. The Nordic countries believed that the Commission had done a remarkable job through the years. However, they would like it to take a frank look at its agenda and consider the removal of certain topics, which would make it possible to work faster and more efficiently on those that remained.

42. Turning to the topic of unilateral acts of States, the Nordic countries encouraged the Commission to conclude its work in 2006. It should not aim at producing a comprehensive set of rules on unilateral acts, but should focus instead, if feasible, on formulating general conclusions based on the Commission's work on the topic, perhaps by adopting guidelines on that topic.

43. The Nordic countries had commended the Commission for its draft articles on international liability for injurious consequences arising out of acts not prohibited by international law as a valuable and pragmatic achievement. As for the form of the final instrument, they favoured options other than a convention, such as the adoption of principles by way of a General Assembly resolution. In addition, they believed that the draft principles on allocation of loss in the case of transboundary harm arising out of hazardous activities should be adopted in conjunction with the adoption of the draft principles on international liability.

44. Noting the interesting and thought-provoking work done by the Study Group on Fragmentation of International Law, he said that the Nordic countries would submit more detailed comments during the session devoted to the topic.

45. Although the report of the Special Rapporteur on effects of armed conflicts on treaties included a complete set of draft articles that suggested the readiness of the topic for codification, much work remained to be done. A topic that called for further

discussion was the legality of conduct of the parties to an armed conflict and the possible asymmetry in the relationship between an aggressor State and a victim State. In that regard, the main rule of continuation of treaties during an armed conflict was well-argued and grounded. The Nordic Group agreed that the topic should form part of the law of treaties, and not part of the law relating to the use of force.

46. **Ms. Kamenkova** (Belarus) said that her country attached great importance to the Commission's work on the draft articles on responsibility of international organizations. The draft articles, together with the articles on responsibility of States for internationally wrongful acts would strengthen the international legal regime and encourage the development of a new branch of international law — a law of international responsibility — which should, in her delegation's view, encompass all types of responsibility of the various subjects of international law.

47. The Commission's approach of basing the draft articles on responsibility of international organizations on the articles on State responsibility was a useful one. However, the articles on State responsibility were not automatically applicable in every case to the responsibility of international organizations.

48. Draft article 15 constituted a clear provision that an international organization incurred responsibility for the authorization of an internationally wrongful act, which would make it incumbent upon the organs of an international organization to analyse all the relevant circumstances when they authorized member States or another international organization to commit an act.

49. The question of the responsibility of a State for the internationally wrongful act of an international organization required further detailed work. The exclusion of that responsibility from the scope of application of the draft articles would amount to the preservation of a substantial lacuna in international law.

50. Because the international legal nature of an international organization was derived from States, such an organization might use certain member States to implement a wrongful policy and to distribute responsibility for it among all their members. It was therefore vital to include in the draft articles a provision allowing for a member State to incur responsibility for the internationally wrongful conduct of an international organization. Specifically, a State should incur responsibility if it coerced an international organization to commit a wrongful act, if it directed other States to do so or if it exercised control over them in the commission of a wrongful act under the auspices of an international organization.

51. A nuanced approach should be taken to the establishment of responsibility of a State for an internationally wrongful act of an international organization, in particular for participation in the commission of a wrongful act. Account should be taken of whether an individual State had the freedom to choose whether or not to participate in the commission or authorization by the international organization of the act. Recognition of the responsibility of States for internationally wrongful actions or omissions of an international organization would force States to take a more considered approach to their membership of international organizations and, in general, would strengthen legality in the activities of all international organizations.

52. The concept of joint or additional (subsidiary) responsibility, which should be both political and material in nature, might be useful in determining the responsibility of States for certain actions of international organizations. In certain situations, it would be appropriate to absolve international organizations of responsibility for internationally wrongful acts and to provide instead for the collective responsibility of member States, particularly with regard to international organizations with limited resources and a small membership, where each member State had a high level of control over the organization's activities.

53. The Commission's work on responsibility of international organizations was still in its early stages and complex issues remained to be resolved, such as the development of an implementation mechanism, which would to a large extent determine the success of the Commission's efforts.

54. Her delegation welcomed the Commission's work on the topic of the expulsion of aliens. At the current stage, the Commission should focus on existing international practice in that area. The eventual outcome of its work could take the form of a guide to practice or a political declaration. A balanced approach was necessary, based on respect for the sovereign right of a State to regulate the presence of aliens in its territory and taking into account the importance of the

fulfilment by States of their international human rights obligations. Belarus supported the view that the topic of expulsion of aliens covered both the removal of aliens who were illegally present in the territory of a State and the removal of those who were legally present.

55. Belarusian law set out in detail the grounds and procedure for the removal of aliens. Her country was willing to transmit extracts from its legislation to the Commission to be used in the analysis of international practice.

56. **Mr. Greva** (Slovakia) said that the expulsion of aliens was of particular interest since it remained a common practice in all parts of the world. The status of aliens formed the subject of numerous bilateral and multilateral treaties and was also covered by the domestic legislation of many States. It was therefore a factor in international relations. In his preliminary report (A/CN.4/554), the Special Rapporteur had rightly identified the key issues and the main difficulties inherent in the subject matter.

57. Although, in international law, a State possessed a generally recognized right to expel aliens, that right was neither absolute nor discretionary. International law, especially human rights law, set limits on the exercise of that sovereign right. It was therefore essential that the Commission should first establish the scope of the topic before dealing with definitions.

58. The scope should not be unnecessarily broad; it must stay within the framework provided by international customary law. It should exclude not only the admission of aliens, which raised a separate set of issues, but also the status of internally displaced persons and people in transit, and the expulsion of a State's own nationals. It should, however, cover the removal of foreign nationals regardless of whether they had entered the country legally or illegally.

59. The Special Rapporteur had correctly defined the two main terms "expulsion" and "alien", since expulsion was indeed the removal of an alien from the territory of a State forcibly or under the threat of forced removal. Nevertheless, it might not always be a formal measure. At the current stage of the Commission's work, the term "alien" should at least encompass all categories of persons residing in the territory of a State who did not have the nationality of that State, including political refugees, asylum-seekers, migrant workers and stateless persons.

60. Expulsion must be in keeping with the law, and the expulsion order must explicitly state the grounds on which it was based, so as to prevent abuse of that right and ensure legal certainty and the rule of law. Some restrictions on the exercise of that right might already exist under international law in order to guarantee the application of human rights norms.

61. In response to the Commission's request for information concerning State practice, he explained that Slovak domestic legislation recognized administrative and judicial forms of expulsion of aliens. Judicial expulsion could be imposed as an additional sentence in criminal proceedings. Administrative expulsion was rather wider in scope and could be ordered in the context of administrative proceedings. Expulsion was defined as a legal act terminating the stay of an alien, setting a deadline for leaving the country and imposing a ban on re-entry for a specified period of time. Any decision regarding expulsion had to be in conformity with the law and the legal grounds for it must be specified in that decision. Such justification was broadly defined in terms of security and public order concerns. The expulsion procedure was the same for legal and illegal aliens, but the illegal presence of a person in Slovak territory could alone constitute grounds for his or her expulsion. Collective expulsion was prohibited.

62. The law also defined impediments to expulsion, most of which stemmed from international human rights law. Hence aliens could not be expelled to a State where their life or personal freedom could be jeopardized on account of their race, gender, nationality, religion, social status or political belief or where they could be subjected to torture, cruel, inhuman or degrading treatment or punishment.

63. The Commission ought to pursue its identification of the applicable rules of customary international law and continue to review State practice and relevant domestic legislation in order to gain a clearer picture of existing rules. It would also be essential to consider multilateral conventions, especially those relating to human rights.

64. **Mr. Panin** (Russian Federation) said that the Commission's impressive attainments in the sphere of the codification and progressive development of international law, which had resulted in the drafting of numerous seminal international agreements of a universal nature, meant that it should be given optimal

working conditions. Its sessions should not therefore be curtailed. Similarly, it would be advisable to restore the practice of paying special rapporteurs a fee.

65. The growing role of international organizations necessitated the codification of the rules governing their responsibility. Many facets of international relations that had once been the exclusive prerogative of States were being regulated through the binding decisions or recommendations of such organizations. Hence it was likewise vital to determine the relationship between their responsibility and that of member States. The Commission's approach to the topic was judicious, in that it had pinpointed the aspects which had particularly required regulation. For example, in chapter III, on breach of an international obligation, the Commission had ascertained that the general principles for establishing the existence of such a breach on the part of a State might also be applicable to international organizations. Despite the fact that the rules had been borrowed from the articles on State responsibility, they should be accompanied by commentaries which were as detailed as possible in order to reflect the specific standards governing international organizations' activities. Although practice in the sphere of the responsibility of international organizations was not extensive, the commentary should describe instances in which a particular norm had applied to international organizations.

66. The principle established in draft article 8, paragraph 2 was of great significance. The Commission had managed to find an elegant solution to the academic dispute as to whether the rules of an organization were provisions of international law. The wording of article 8 made it possible, without prejudging that question, to emphasize that an international organization bore responsibility under international law for a breach of its own rules. The precise circumstances in which a breach of the rules gave rise to such responsibility obviously had to be decided in each specific case in the light of the type of rule in question.

67. Chapter IV dealt with a much more complex and sensitive issue, namely the relationship between the responsibility of an organization and that of its member States and even other States on behalf of which the organization was competent to take a decision. That draft articles did not, however, fully reflect the difference between regulating the responsibility of international organizations and regulating the responsibility of States. For example, when determining the responsibility of international organizations in connection with assistance in, or direction and control of, the commission of an internationally wrongful act, due heed had to be paid to the fact that some actions could be taken only by States and not by international organizations. In that connection, it was doubtful if there was any justification for introducing in articles 12 and 13 the criterion that the act would be internationally wrongful if committed by that organization.

68. In the future, a study must be made of the relationship between classical articles about assistance, coercion and control in the context of the commission of an internationally wrongful act and draft article 15 on decisions, recommendations and authorizations addressed to member States and international organizations. The commentaries stated that articles 13, 14 and 15 might partially overlap, but that finding was not enough. Since the adoption of a binding decision by an international organization must be regarded as a means of coercion, it was unclear why establishment of the responsibility of the international organization for a binding decision had been made contingent on an additional condition. Why had it been necessary to stipulate that an act would be internationally wrongful if it were committed by the organization itself and if it would circumvent an international obligation of that organization? That criterion was absent in the draft article on coercion. If not all binding decisions were coercive, in what circumstances did they constitute coercion?

69. Article 15, paragraph 2 (b), which referred to responsibility in connection with an authorization or recommendation, also prompted some misgivings. If an international organization recommended that its members should breach an obligation binding on that organization, or authorized them to do so, then obviously the organization must incur responsibility, even when its members did not use its recommendation or authorization. Responsibility in that case would clearly be different in nature and might consist solely in a duty to cease such calls for action or to revoke such authorizations. At all events, more work needed to be done on chapter IV at its second reading.

70. Turning to the questions addressed to Member States on that topic, he said that particular attention must be paid to the section on circumstances

precluding wrongfulness in the context of the responsibility of international organizations. It would be wrong to mechanically transfer to that section the rules governing State responsibility. Certain difficulties might arise if an attempt were made to apply certain circumstances precluding wrongfulness, such as self-defence, to international organizations. On the other hand, the notion of "necessity" must obviously be fleshed out and extended to situations in which an international organization decided to introduce sanctions. Similarly, a circumstance such as coercion must fully apply to international organizations, especially coercion by States, an important aspect which deserved thorough study by the Commission. The topic must likewise include the aid or assistance of an international organization in the commission of a wrongful act by a State.

71. Whether there were other circumstances in which a State might bear responsibility for the internationally wrongful act of an international organization was a question which could be decided when the Commission considered possible means of influencing an international organization (aid, assistance, control or coercion). To that end, it would be wise to delineate what was meant by those terms.

72. He welcomed the start of work on the topic of the expulsion of aliens. His Government shared most of the Commission's views on the subject, especially the thesis that expulsion was a sovereign right of a State. A State had very broad, but not limitless, discretion to decide on expulsion. The Commission ought to concentrate its attention on the limitations placed on expulsion by international law. It would be useful to ascertain in what circumstances expulsion might constitute an internationally wrongful act and either give rise to State responsibility or prompt the use of means of diplomatic protection by the State of nationality of the person concerned. Furthermore, a distinction ought to be drawn between aliens legally and illegally present on the territory of a State. In the case of illegal immigrants, any restrictions could concern only the methods of expulsion.

73. The comprehensive approach to the topic suggested by the Special Rapporteur was correct and should include a detailed perusal of the provisions of existing conventions on the expulsion of aliens, particularly those covering refugees and migrant workers. Attention must focus on those aspects of the topic which had not yet been regulated in international law. There was no reason to exclude subjects such as a change in citizens' status due to a change in status of the territory in which they were residing. The analysis should not deal with States' policy in the field of immigration or emigration, but with refusal of entry. There was no justification for examining expulsion in the course of an armed conflict, since that issue was already covered by international humanitarian law.

74. At first glance, the Special Rapporteur's decision to class not just foreign citizens but also stateless persons as "aliens" and to encompass not only official or lawful acts of States in the term "expulsion" seemed to be well founded. His Government would be pleased to place its national legislation on the expulsion of aliens at the Commission's disposal.

75. **Ms. Gavrilescu** (Romania), speaking on the topic of responsibility of international organizations, said that her delegation shared the opinion of the Special Rapporteur that articles 8 to 11, concerning the breach of an international obligation, should follow the general pattern of the corresponding provisions of the articles on responsibility of States for internationally wrongful acts. Her delegation also considered entirely justified the analogy drawn between the situation of an international organization held to be responsible for the act of a State or another international organization, on the one hand, and that of a State responsible for the act of another State, on the other. There was no reason to adopt different conditions or approaches with regard to the two types of subject.

76. Her delegation also wished to affirm the need to bear in mind, in establishing the conditions under which an international organization might be held responsible, the specific nature of certain international organizations and the way in which powers were distributed between such organizations and their member States. One example was the European Community and its practice with regard to the responsibility of States for the implementation of legislation adopted by the Community. The very specific nature of the rules applicable in the context of the Community would also have to be taken into account in considering the responsibility of an organization for a breach of an obligation set by a rule of the organization (draft article 8, paragraph 2), given that it would be inconceivable that the Community should be found to be responsible for the breach by one of its institutions of a rule of secondary legislation.

77. On the question of the responsibility of a State for aid or assistance given to an international organization in the commission of an internationally wrongful act, her delegation was of the opinion that it was preferable to incorporate such provisions in the current draft, inasmuch as the text on the responsibility of States did not contain any reference to that type of situation. In that context, the State should be held responsible in the event that it directed, controlled or coerced an international organization in the commission of an internationally wrongful act.

78. As concerned the issue of the expulsion of aliens, she agreed that it was necessary to give close attention to reconciling the right to expel with the requirements of international law, in particular those relating to protection of human rights, while other aspects, such as those relating to immigration policy or a State's control of its frontiers, fell outside the scope of the topic. In any event, she felt that the work of the Commission should look first at national legislation and at all the rules on the subject that existed in customary international law, in international treaties and in the practice of States and then, after that analysis, determine whether the existing rules were sufficient or new ones needed to be developed.

79. **Mr. Curia** (Argentina), referring to the topic of responsibility of international organizations, noted that international organizations had four main features: their composition was essentially intergovernmental, they were generally treaty-based, they had a permanent organizational structure and they enjoyed legal autonomy. At the same time, international organizations were entities created by the will of States for specific purposes. That being the case, his delegation found the reference to other entities in draft article 2 inappropriate, as it might introduce variants that deviated from the traditional concept of what constituted an international organization. For that reason and in order to correctly identify their potential members, it would be wise to clearly establish what was meant by "other entities", even if the definition was not included expressly in the text of the instrument.

80. The necessary interrelationship between the organization and the States that had created it, which was part of the very nature of an international organization, seemed to be reflected in paragraph 2 of draft article 1. However, as currently drafted, that article seemed to suggest that responsibility might be attributed to a State for a wrongful act committed by the international organization. That was not consistent with the principle expressed in draft article 4, which limited attribution of responsibility to the conduct of an organ or agent of the organization. It might be prudent to limit the responsibility of States for internationally wrongful acts exclusively to the terms of General Assembly resolution 56/83 and not introduce new criteria on the attribution of that responsibility.

81. The clear correspondence between the draft articles and the articles on State responsibility was both appropriate and desirable, since the general principles, the characterization and the attribution of the wrongful act and the consequent responsibility therefore had to follow the same parameters. That correspondence was evident not only in the substance but also in the form of the draft articles. Hence, it might be necessary to redraft some of the subheadings in the draft articles. The articles on State responsibility, for example, referred to "elements of an internationally wrongful act of a State", whereas the draft article referred to "general principles", which, moreover, did not accurately describe the content that followed.

82. In relation to draft article 4, a matter that deserved further thought was whether or not there was a limit in regard to the attribution of responsibility for the conduct of an organ or agent of an international organization. For example, should the attribution of responsibility extend to short-term staff or personnel deployed in peacekeeping operations? Also with reference to draft article 4, in his delegation's view, the term "organs" should be included in paragraph 2 along with "agents". In addition, the definition of "rules of the organization" in draft article 4, paragraph 4, should include the rules of procedure and statutes of its organs.

83. Another important point was that the frame of reference for assessing the conduct of an organ or agent of an international organization would always be based on the rules of the organization. Otherwise, there was risk of imprecision or subjectivity. As for draft article 8, paragraph 2, it pointed up a controversial issue, as was reflected in the commentary thereon. Indeed, whether or not the rules of an international organization constituted international obligations was still under discussion. The text that was ultimately adopted should leave no doubt and should be the result of consensus.

84. In sum, the articles on State responsibility provided an appropriate framework for the draft articles, eliminating ambiguities and avoiding the reopening of unnecessary debate on the topic. In his delegation's view, the draft articles were an exemplary work that shed light on a new aspect of responsibility for wrongful acts: that of international organizations.

85. Turning to the topic of expulsion of aliens, he said that there was a need to clearly delimit the scope of the topic in order to formulate principles and rules that would reconcile the power of States to set the conditions for admission and residence of aliens with the protection of human rights. As was the usual practice, the Commission should begin with a careful examination of customary and treaty rules on the matter. It should also look at international practice and at national legislation.

86. In respect of the latter, information provided by States would be of great importance. Argentina's law on migration might contribute some useful elements for the work of the Commission, particularly as it incorporated the principle that the admission and residence criteria and procedures applied to aliens should be non-discriminatory, in accordance with the rights and guarantees recognized under the national Constitution and international treaties. In Argentina, the latter took precedence over national legislation; moreover, the provisions of many human rights agreements, including the American Convention on Human Rights and the International Covenant on Civil and Political Rights, were enshrined in the Constitution. Argentina therefore welcomed the Commission's decision to examine the issue of expulsion of aliens and looked forward to a detailed study and discussion of the topic.

87. **Ms. Telalian** (Greece), said that the topic of expulsion of aliens lent itself to codification, as there was a significant body of national legislation and practice as well as of international and regional jurisprudence on the subject. The topic also raised important questions of international law, particularly human rights law, and treaty-based judicial and other monitoring bodies had formulated a series of human rights principles and standards that might be applicable to it. Her delegation fully agreed with the Special Rapporteur that one of the most important problems with respect to the expulsion of aliens was how to reconcile the right to expel, which seemed inherent in State sovereignty, with the demands of international law, in particular the fundamental rules of human rights law. What really mattered in that respect was the obligation of the State to strike a fair balance between the individual's rights protected by the relevant rules of human rights law on the one hand and the State's interests in pursuing legitimate aims, such as the protection of public order, on the other.

88. When, however, the right at stake was an absolute one, such as the right to life or the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, her delegation believed that expulsion could not be justified on any grounds. The most important human rights treaties provided procedural guarantees to those under expulsion who were lawfully residing in the territory of a State. That was the case, for example, with article 13 of the International Covenant on Civil and Political Rights. Likewise, human rights treaties provided indirect protection of a substantive character to individuals under expulsion — for example, articles 3 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights had most frequently dealt with the sensitive issue of the right to respect for family life and private life. It should be stressed that while in those cases the Court had relied on various criteria in order to determine the lawfulness of expulsion, it would be difficult to ascertain that there existed a body of uniform rules that could apply to all cases of removal. That was mainly because the Court examined each case on its own merits.

89. The Special Rapporteur had given a broad provisional interpretation of the term "expulsion", which was in line with the concept of expulsion as defined by the Human Rights Committee in its General Comment No. 15 concerning the position of aliens under the Covenant. However, in her delegation's view, such a broad approach to the topic could lead to an unnecessary enlargement of the scope of the report and of the principles that the International Law Commission might decide to draft in that respect. That was because not all the forms of the removal of an alien from the territory of the host State could fall within the same legal regime. It should be noted that both article 13 of the Covenant and article 1 of the seventh protocol to the European Convention covered aliens who were lawfully present in the country concerned — hence the preference expressed by the Commission for carefully delimiting the scope of the

study to those measures which concerned resident aliens. In that respect, her delegation also supported the distinction made by the Special Rapporteur between persons in a regular situation and those in an irregular situation (including those who had been residing for a long time in the State seeking to expel them).

90. Her delegation also agreed with the Special Rapporteur that displaced persons should be left outside the scope of the topic. The same applied to refoulement, non-admission of asylum-seekers, refusal of admission for regular aliens and questions relating to immigration or emigration policies, all of which should be excluded from the study of the topic. As for issues related to mass population expulsions in periods of armed conflicts that were regulated by international humanitarian law, her delegation felt that they could be considered under the future study. Nevertheless, should the Commission eventually opt to enlarge the scope of the present topic, an attempt should be made to draw up a minimum of guarantees in some areas, such as the prohibition of maltreatment of aliens who had been or were being expelled and the protection of their human dignity.

91. Her delegation agreed with the Special Rapporteur's comment in paragraph 20 of his report (A/CN.4/554). Grounds for expelling aliens, such as preservation of the public order or national security or even the violation of rules relating to the entry and stay of aliens were admissible under international law. Decisions for expulsion based on discriminatory grounds, such as religious belief, national or ethnic origin, or sexual orientation or behaviour, on the other hand, should be inadmissible. In that connection, it should be recalled that the Committee on the Elimination of Racial Discrimination, in its General Recommendation No. 30 on discrimination against non-citizens, affirmed that States must ensure that laws concerning deportation or other forms of removal of non-citizens from the jurisdiction of the State party did not discriminate in purpose or effect among non-citizens on the basis of race, colour or ethnic or national origin. In any case, given that grounds for expulsion could be interpreted broadly, what was really important was preservation of the principle of proportionality.

92. In paragraph 22 of his report, the Special Rapporteur mentioned that the lawfulness of the expulsion depended on two factors: conformity with the expulsion procedures in force in the expelling State and respect for fundamental human rights, thus rightly underlining the procedural and the substantive aspect of the protection of persons under expulsion. As concerned the procedural aspect, article 13 of the Covenant contained a range of significant safeguards for aliens legally residing in a State, including respect for the procedures provided by the respective legislation. Furthermore, the European Court of Human Rights had ruled that States could not mislead aliens, even those who were in breach of immigration rules, in order to deprive them of their liberty with a view to expelling them. Members of the Commission had referred to a wide range of fundamental guarantees applied to the entire process of expulsion. The possibility for administrative and judicial appeals against the act of expulsion had particular significance, especially in situations in which the alien was under detention.

93. With regard to collective or mass expulsions, her delegation noted that such measures were prohibited by the fourth protocol to the European Convention, and article 13 of the Covenant also seemed to be incompatible with such practices. The Human Rights Committee, in its General Comment No. 15, had found that article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. That understanding, in the opinion of the Committee, was confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by, and to be represented before, the competent authority. It was true that the procedural rights of aliens could be limited on grounds of national security. Those grounds, however, had to be really compelling, according to General Comment No. 15.

94. Similarly, the European Court of Human Rights had ruled that even where national security was at stake, the concepts of lawfulness and the rule of law in a democratic society required that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be, with appropriate procedural limitations on the use of classified information.

95. The Special Rapporteur, in paragraphs 26 and 27 of his report, raised delicate issues that required careful consideration, including diplomatic protection, compensation and the right of expellees to return to

countries from which they had been improperly expelled. In that respect, her delegation agreed with the view expressed by some members of the Commission, namely, that the focus at the present stage should be on the basic questions of the rights and duties of States with respect to expulsion, leaving for a later stage the question of whether to attempt to elaborate on the consequences for breaches of those duties.

96. Her delegation also agreed that the Special Rapporteur should be encouraged to undertake a detailed consideration of existing customary international law and treaty law, including a comparative study of international case law, both at the global and the regional levels, as well as of national laws and practice. However, her delegation was quite sceptical about the need to draw up a comprehensive legal regime. Although it would be useful to include in the definitions the various categories of aliens and the many forms of expulsion, the scope of the future set of draft rules should be carefully delimited. A set of draft rules that would cover a broad array of issues coming under different legal regimes, or for which there were already settled rules, would be of limited added value.

97. **Mr. Lavalle-Valdés** (Guatemala), referring to the topic of international responsibility of international organizations, said that members of United Nations peacekeeping operations necessarily exercised some control over the inhabitants of the areas where they were assigned. Such powers resembled those normally exercised by Governments. Therefore the question arose whether the articles on the responsibilities of international organizations should include some articles that, mutatis mutandis, reflected articles 8 and 9 of the articles on State responsibility.

98. Whether or not the change was made that had been recommended in paragraph 17 of the third report of the Special Rapporteur (A/CN.4/553*), paragraph 2 of draft article 8 implied that an organization incurred responsibility under international law for the violation of one of its internal rules only if that rule coincided with a rule of international law which was not in itself part of those internal rules. That also implied that the internal rules of an international organization were not necessarily part of international law.

99. Accordingly, an objective criterion could be established for the purpose of determining which internal rules of an international organization belonged to the sphere of international law. A subjective criterion, however, could also be applied. Thus, the only internal rules that would be considered to be part of international law would be those that bound, or granted rights to, persons or entities that were subjects of international law. By adopting a similar but more restrictive criterion, it might also be maintained that an internal rule would be part of international law only if its violation caused injury to a subject of international law.

100. Such criteria, besides being difficult to apply, became even more complicated in view of the possibility that the relations between an international organization and a person or entity not subject to international law could amount to something similar to diplomatic protection, on the part of the State of which the injured person or entity was a national.

101. There would presumably be no need for such criteria in all cases, or at least in most cases, where the internal law of an international organization contained a provision equivalent to Article 100 of the Charter of the United Nations and where the State in question was a member of the organization. And yet, something similar to diplomatic protection might also exist for international organizations. In any event, draft article 8 and the commentary should be amended to eliminate any doubt about the problems described. Furthermore, in the interests of precision, it would be useful to insert into draft article 8, paragraph 1, before the word "when", between commas, the words "if that obligation is binding on the international organization".

102. His questions with regard to draft articles 12 and 13 were also related to the fact that those articles were the same, mutatis mutandis, as articles 16 and 17 on State responsibility. He doubted that paragraph (b) of articles 16 and 17 could be directly applied to draft articles 12 and 13, in respect of cases in which an international organization acted in general conformity with the provisions of draft articles 12 and 13, but where paragraph (b) did not apply. The wording of those articles might imply that such conduct conformed to international law. And yet, going further into the question, it was difficult not to conclude the contrary. That conclusion would be based, in the absence of a customary international law prohibiting such conduct, on general principles of law, which, in accordance with article 38, paragraph 1 (c), of the Statute of the International Court of Justice, were part of international law.

103. In his view, there was no country in the world in which an individual who was not a party to a contract with two other individuals could knowingly assist one of them in violating that contract without incurring responsibility for injuries caused to the other party to the contract as a consequence of the violation. However, in order for an international organization to act as set out in draft articles 12 and 13, but without the application of paragraph (b) of either article, the rule that the international organization would be violating would be a fundamental principle of international law. Naturally, the same could be said, mutatis mutandis, for such conduct carried out by a State.

104. With regard to the word "State" as it appeared in draft articles 12, 13 and 14, he felt that, for the purposes of those articles, the term applied as much to a State that was a member of an international organization as to one that was not. Those provisions should be modified so that that idea was expressed explicitly.

105. With respect to paragraphs 1 and 2 of draft article 15, he wondered whether the words "and would circumvent an international obligation of the former organization" might be superfluous. His doubts were confirmed in paragraph (4) of the commentary to article 15. The international organization referred to in the first line of paragraph 2 of the article would presumably incur responsibility only if, in the absence of an authorization or recommendation by the international organization, the State or international organization referred to in subparagraph (b) had not committed the internationally wrongful act. In most cases, it would be extremely difficult to prove that the condition had been fulfilled. That would be so, for instance, if the commission of the act benefited the State that had committed it.

106. To the extent that the act was lawful for the State or international organization in question, paragraph 3 of draft article 15 did not seem logical. Was there, for example, any country in the world in which it would be unlawful for Juan to recommend to Pedro to tear down a building that belonged exclusively to Pedro? Moreover, if the provision contained in paragraph 3 were reasonable, it would also presumably figure in the articles on responsibility of States, which was not the case.

107. Turning to the matter of the expulsion of aliens, he said that topic was of particular interest to his Government, and he was therefore closely following the consideration and evolution of the topic.

108. His delegation was also interested in a suggestion made the previous year on behalf of the Nordic countries to the effect that the International Law Commission should take up the topic of law applicable to humanitarian assistance in the event of natural disasters.

109. **Mr. van Bohemen** (New Zealand) said that his delegation welcomed the Commission's progress on a number of topics, and hoped, in particular, that it could complete its work on the topics of diplomatic protection, international liability in case of loss from transboundary harm arising out of hazardous activities, and fragmentation of international law in the coming year.

110. His delegation supported the approach the Commission had taken to the topic of responsibility of international organizations and agreed with the practice of following the articles on responsibility of States, unless there was good reason to depart therefrom. With regard to draft articles 12 and 13, it supported the decision to model them on the corresponding articles on responsibility of States, mutatis mutandis. It also agreed that the Special Rapporteur was right to consider situations in which an international organization that was bound by a particular obligation used its power to compel member States not so bound to take actions that would circumvent the organization's obligation, or, for the same purpose, authorized or recommended that such actions should be taken. The distinction was appropriately drawn between binding decisions of the organization and decisions that only authorized or recommended the action in question; New Zealand supported that formulation.

111. **Mr. Kessel** (Canada) expressed his Government's interest in the ongoing work of the International Law Commission on the issue of expulsion of aliens, and took note with appreciation of the Special Rapporteur's preliminary report. Canada supported the general approach that had been proposed by the Special Rapporteur, and looked forward to the Secretariat's compilation of relevant international and domestic law. In order to facilitate that process, the Secretariat might look to the important work done over the past four years under the Berne Initiative and through the International Organization for Migration, as well as

through the Global Commission on International Migration, which had recently presented its report to the Secretary-General. A comprehensive study of that more focused topic, including State practice, might be of assistance in clarifying the relevant rules of international law.

112. The work of the International Law Commission could also usefully take into account the duty of States of origin to accept the return of their nationals, including the return of stateless persons who had been deprived of their nationality prior to obtaining a new nationality in a manner contrary to international law. With respect to migrant workers, it should be noted that the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families imposed obligations only on States parties.

113. **Mr. Gaja** (Special Rapporteur on responsibility of international organizations) said he would attempt to clarify the scope of the current work of the Commission on the complex relations of responsibility of States and responsibility of international organizations. According to draft article 1, the draft articles were intended to deal with responsibility of States only to the extent that a State might incur responsibility for the intentionally wrongful act of an international organization.

114. A first set of issues, within the scope so defined, concerned cases in which a State aided or assisted or directed and controlled an international organization in the commission of an internationally wrongful act or coerced it to commit such an act. The question raised by the Commission was whether it was necessary to spell out those cases in which a State incurred responsibility. The rules provided in the articles on responsibility of States only dealt with inter-State relations. However, those rules could be applied by analogy to the case in which a State aided or assisted an international organization. Therefore, it might seem unnecessary to reiterate those rules in the draft articles on responsibility of international organizations. Views on that point would be very useful to the Commission.

115. The second set of issues, also not covered by the articles on responsibility of States but which fell within the scope of the draft articles under discussion, was that of the possible responsibility of member States when an international organization was held responsible. That was the most extensively discussed question relating to responsibility of international organizations. It was also considerably relevant in practice. Since the Commission would address that topic the following year, preliminary views of Governments would provide helpful guidance.

116. There were further cases in which the responsibility of States and the international responsibility of international organizations were connected. Draft article 15 considered the international responsibility of an international organization in the case of decisions binding its member States to commit what might be an internationally wrongful act. A further question would be to assess whether the fact that a State was bound by the organization might provide a justification for the State and exonerate it from international responsibility. That important question, which was part of the responsibility of States, seemed to lie outside the scope of the draft articles under discussion. The same was true for cases in which infringement by a State on an international obligation paralleled an infringement by an international organization.

The meeting rose at 1.05 p.m.